

PUBLIC SESSION AGENDA
NORTH CAROLINA STATE BOARD OF CPA EXAMINERS
JANUARY 26, 2015
10:00 A.M.
1101 OBERLIN ROAD
RALEIGH, NC

I. Administrative Items

A. Call to Order

In accordance with the State Government Ethics Act, it is the duty of every Board member to avoid both conflicts of interest and appearances of conflict. Does any Board member have any known conflict of interest or appearance of conflict with respect to any matters coming before the Board today? If so, please identify the conflict or appearance of conflict and refrain from any undue participation in the particular matter involved.

1. Public Hearing - Paul L. Erickson

B. Welcome and Introduction of Guests

C. Approval of Agenda

D. Minutes

E. Financial/Budgetary Items

1. Financial Statements for December 2014

II. Legislative & Rule-Making Items

A. 21 NCAC 08G .0409 as Filed with Rules Review Commission for Rule-Making (FYI)

III. National Organization Items

IV. State & Local Organization Items

A. Status of the Court of Appeals Case Regarding Fiduciary Duty of CPAs

V. Request for Declaratory Ruling

VI. Committee Reports

A. Professional Standards

B. Professional Education and Applications

VII. Public Comments

VIII. Closed Session

IX. Executive Staff and Legal Counsel Report

X. Adjournment

PUBLIC SESSION MINUTES
North Carolina State Board of CPA Examiners
December 15, 2014
1101 Oberlin Road
Raleigh, NC 27605

MEMBERS ATTENDING: Miley (Bucky) Glover, CPA, President; Michael H. Womble, CPA, Vice President; Wm. Hunter Cook, CPA, Secretary-Treasurer; Tawannah G. Allen, Ed.D; Murchison (Bo) Biggs, CPA; George W. Rohe, CPA; and Jeffrey J. Truitt, Esq.

STAFF ATTENDING: Robert N. Brooks, Executive Director; David R. Nance, CPA, Deputy Director; Frank Trainor, Esq., Staff Attorney; Lisa R. Hearne, Manager-Communications; Ann J. Hinkle, Manager-Professional Standards; Kayla White, Assistant-Professional Standards; Buck Winslow, Manager-Licensing; and Noel L. Allen, Legal Counsel.

GUESTS: James T. Ahler, CEO, NCACPA; Sharon Bryson, COO, NCACPA; Mark Sotichack, CPA, NCACPA; Amanda Davis, Infrastructure & Design Manager, NCACPA; Walter C. Davenport, CPA, Chair, NASBA; Curt Lee, Legislative Liaison, NCSA; Suzanne Jolicoeur, Senior Manager, State Regulation & Legislation, AICPA; and Officer K.C. Min, Raleigh Police Department.

CALL TO ORDER: President Glover called the meeting to order at 10:05 a.m.

MINUTES: The minutes of the November 17, 2014, meeting were approved as submitted.

FINANCIAL AND BUDGETARY ITEMS: The November 2014 financial statements were accepted as submitted.

Dr. Allen presented the recommendations of the Professional Education and Applications Committee's review of the information related to the Board's current fee structure. Dr. Allen stated that the Committee did not recommend any reduction in fees charged by the Board. The Committee asked the Executive Staff to determine if Board funds could legally be expended in support of the NASBA Center for the Public Trust and to determine how well the current Exam scholarship/voucher program is working and if it can be approved.

LEGISLATIVE AND RULE-MAKING ITEMS: Mr. Cook and Dr. Allen moved to approve the draft amendment to 21 NCAC 08G .0406 for rule-making. The draft was

discussed and Messrs. Truitt and Cook offered a substitute motion with changes. Motion passed with seven (7) affirmative and zero (0) negative votes.

NATIONAL ORGANIZATION ITEMS: Messrs. Cook and Biggs moved to approve the draft response as amended to the AICPA BOE *Invitation to Comment on Maintaining the Relevance of the Uniform CPA Examination*. Motion passed.

STATE AND LOCAL ORGANIZATION ITEMS: Mr. Trainor and Mr. Allen reviewed an NC Court of Appeals ruling regarding a North Carolina CPA and the effect of the ruling on the regulation of CPAs in North Carolina by the Board. The Board instructed President Glover to send a letter to the National Association of State Boards of Accountancy (NASBA) requesting that NASBA file an *amicus curiae* brief on behalf of the profession and all boards of accountancy.

REPORT OF THE PROFESSIONAL STANDARDS COMMITTEE: Mr. Cook moved and the Board approved the following recommendations of the Committee:

Case No. C2014225 - Julia Chiu Smith - Approve the signed Consent Order (Appendix I).

Case No. C2014243 - Beverly Schain - Approve the signed Consent Order (Appendix II).

Case No. C2014304 - Bryson David Kiser - Approve the signed Notice of Apparent Violation and Agreement to Cease and Desist (Appendix III).

Case No. C2014353 - William Daniel Turner, Jr. - Approve the signed Notice of Apparent Violation and Agreement to Cease and Desist (Appendix IV).

Case No. C2014365 - Kelly-Jean Kwiatkowski - Approve the signed Notice of Apparent Violation and Agreement to Cease and Desist (Appendix V).

Case No. C2014069 - Close the case without prejudice.

Case No. C2014192 - Close the case without prejudice.

Case No. C2013018-1 and Case No. C2013018-2 - Close the cases without prejudice.

REPORT OF THE PROFESSIONAL EDUCATION AND APPLICATIONS COMMITTEE: Dr. Allen moved and the Board approved the following recommendations of the Committee:

Reciprocal Certificate Applications - The Committee recommended that the Board approve the following:

Craig J. Adams
Catherine Taylor Blackmon
Lisa Jane Cunningham
Thomas Lee Fiepeke

Jon A. Manning
Reshma Naresh Mulchandani
Peggy Pei-Chi Wang

Temporary Permits - The Committee recommended that the Board approve the following temporary permits that were approved by the Executive Director:

Sarah Machel Bazzle, T8205
David Alan Berk, T8206
Craig Allan Higgins, T8207
James Cole Younger, T8208
Robert Paul Hureau, T8209
David Michael Grim, T8210
Troy Edward Dolan, T8211
Jessica Kathleen Cavett, T8212
Kevin Matthew Kaval, T8213
Megan Naugle Seymore, T8249

Michael David Westfall, T8250
Mark Stephen White, T8251
Bryce Staliper Blair, T8252
Thomas Vernon, Jr., T8253
Alejandro Karlo Pulido, T8254
Joseph Richard Pavone, T8255
Jill Marie Goossen, T8256
Jaclyn Susanne Lee, T8257
Oscar Arnulfo Perla, T8258

Reinstatements - The Committee recommended that the Board approve the following:

James Winston Harrison, #10369

Virginia Newton Long, #14816

Reissuance of New Certificate - The Committee recommended that the Board approve the application for reissuance of new certificate submitted by Torrell Maurice Armstrong, #32980.

Firm Registrations - The Committee recommended that the Board approve the professional limited liability company, R. Craig Durham, CPA PLLC, that was approved by the Executive Director.

Examinations - The Committee recommended that the Board approve the following staff-approved applicants to sit for the Uniform CPA Examination:

Ylora Acosta
Elizabeth Adams

Michael Alford
Kristen Alston

Christopher Anderson
Pommy Aynu
Trent Ball
Svyatoslav Bashmakov
William Black
Brigitte Borucki
Andrew Bowman
David Boyles
Eric Brown
Hannah Brown
Ashley Bryant
Lacie Byers
Sharron Caci
John Capasso
Matthew Carle
Nancy Cates
Wenjun Chen
An Thu Chu
Athina Conklin
John Copley
Chase Crone
Chelsea Cunningham
Lewis Curtis
Stacy Daniel
Danielle Dannahower
Carolyn Davis
Bret Denning
Michelle Denning
Lauren Donadio
Alicia Dunn
Evan Dupe
Jessica Earles
Kyle Ebinger
Nancy Elliott
Kasie Elmore
Zhaoyi Fan
Shawn Fitzgerald
Ross Foshee
Breenan Fox
Jordan Frazier
Sarah Friel
Michael Gannon
Christopher Ganzon

Denise Gauthier
Christopher Greenwell
William Hall
John Hartman
Lauren Hatcher
Ashley Hawkins
Kesley Heit
Maria Hernandez Gomez
Forrest Hester
Thomas Hollingsworth
Kelsey Hopper
Malorie Irwin
Jerry Jarrell
Kristin Jarvis-DeSouza
Arik Johnson
NamHee Jones
Lloyd Jordan
Israa Kanfoud
Joseph Kerrigan
Doyeon Kim
Aaron King
Stephen King
Ruth Klein
David Knight
Adam Kovalevsky
T Morris Kwekeh
Andrea Lambert
Andrew Linn
Andrew Linville
Nataly Lopera
Travis Lowman
Erica Mackey
Evelyne Makatiani
Jacob Mattern
Mitchell Mayer
Christopher McCoy
Jennifer McGhee
Marianne McKnight
Melissa Milteer
Kimberly Moes
Michael Montague
Ryan O'Neal
Maxwell Ofori

Adaora Okonkwo
Gerald Opyrchal
Trenton Oswalt
Hilary Ott
Brandon Parks
Brittany Patel
Dipali Patel
Urvish Patel
Jeremy Patrick
Chelsea Payne
James Peedin
William Perrault
Diani Popoca
Natalie Reed
Leata Riggs
Mary Rockecharlie
Meridith Rosborough
Stephanie Ruggeri
Steven Schulz
Josepha Segbefia
Elizabeth Senczy
Sarang Shah
Rosemary Sirois

Jacki Smith
Eric Sommermann
Nicholas Speros
James Stephens
Teresa Striblin
John Tassitino
Andrea Taylor
Jonathan Thornton
Michael Trznadel
Kathryn Waldo
Honghong Wang
Binbin Weng
Rachelle Westbrook
Emily Wilkes
Aviance Williams
Brent Williams
Leigh Williams
Ryan Williams
Jessica Wilson
Nellie Wilson
April Wright
Michael Zeblo
Sommer Zusin

Staff reviewed and requested Committee guidance regarding of a hypothetical exam application. The Committee recommended that the Board approve the application contingent on the applicant informing his moral character references of his criminal history.

Miscellaneous - Staff received correspondence from Ashley Elizabeth Waid. Ms. Waid failed to disclose an open container ticket two exam applications and the certificate application. Staff recommended a one-year probationary period for her CPA license. The Committee recommended that the Board approve staff recommendation.

RESOLUTION: President Glover read and presented a Resolution thanking Ann J. Hinkle for her 27 years and 8 months of service to the Board and the citizens of North Carolina as a member of the Board staff and expressing best wishes to her in her upcoming retirement on December 31, 2014.

President Glover moved to make the Resolution (Appendix VI) a part of the minutes. Motion passed.

ADJOURNMENT: Messrs. Truitt and Cook moved to adjourn the meeting at 11:13 a.m. Motion passed.

Respectfully submitted:

Attested to by:

Robert N. Brooks
Executive Director

Miley W. Glover, CPA
President

NORTH CAROLINA
WAKE COUNTY

BEFORE THE NORTH CAROLINA STATE BOARD OF
CERTIFIED PUBLIC ACCOUNTANT EXAMINERS
CASE #: C2014225

IN THE MATTER OF:
Juliana Chiu Smith, #33485
Respondent

CONSENT ORDER

THIS CAUSE, coming before the Board at its offices at 1101 Oberlin Road, Raleigh, Wake County, North Carolina, with a quorum present. Pursuant to N.C. Gen. Stat. § 150B-41, the Board and Respondent stipulate to the following Findings:

1. Respondent is the holder of North Carolina certificate number 33485 as a Certified Public Accountant.
2. Respondent informed the Board on her 2013-2014 individual certificate Renewal ("Renewal") that between January 1, 2012, and June 30, 2013, she had obtained the requisite forty (40) hours of continuing professional education ("CPE") to meet the 2012 CPE requirements.
3. Based on Respondent's representation, the Board accepted her Renewal.
4. Board staff requested that Respondent provide certificates of completion for the CPE reported to meet her 2012 requirements.
5. Respondent provided the CPE certificates of completion to the Board as requested. Respondent was only able to provide documentation for thirty-three (33) hours of continuing professional education ("CPE") taken to meet the 2012 CPE requirements.
6. Respondent wishes to resolve this matter by consent and agrees that the Board staff and counsel may discuss this Consent Order with the Board *ex parte*, whether or not the Board accepts this Consent Order as written. Respondent understands and agrees that this Consent Order is subject to review and approval by the Board and is not effective until approved by the Board at a duly constituted Board meeting.

BASED upon the foregoing, the Board makes the following Conclusions of Law:

1. Respondent is subject to the provisions of Chapter 93 of the North Carolina General Statutes and Title 21, Chapter 08 of the North Carolina Administrative Code, including the Rules of Professional Ethics and Conduct promulgated and adopted herein by the Board.
2. Respondent's actions as set out above constitute violations of 21 NCAC 08N .0202(a), .0202(b)(3), and .0202(b)(4).
3. Per N.C. Gen. Stat. § 93-12(9) and also by virtue of Respondent's consent to this Order, Respondent is subject to the discipline set forth below.

BASED on the foregoing and in lieu of further proceedings, the Board and Respondent agree to the following Consent Order:

1. Respondent's failure to provide adequate documentation of CPE renders the Renewal insufficient and untimely. Respondent's failure to adequately renew her certificate results in an automatic forfeiture pursuant to N.C. Gen. Stat. § 93-12(15).
2. Respondent must return her certificate to the Board within fifteen (15) days of Respondent's receipt of the Board's notification of its approval of this Consent Order.
3. Respondent may apply for the reissuance of her certificate after one (1) year from the date the Board approves this Consent Order and if Respondent's certificate and the civil penalty required in number five (5) of this Order have been timely received by the Board.
4. Respondent may apply to return her certificate to active status by submission and approval of a reissuance application which includes:
 - a. Application form,
 - b. Payment of the application fee,
 - c. Three (3) moral character affidavits, and
 - d. Forty-seven (47) hours of CPE in the twelve (12) months preceding the application including an eight (8) hour accountancy law course as offered by the North Carolina Association of CPAs in a group-study format.

5. Respondent shall pay a one thousand dollar (\$1,000.00) civil penalty, to be remitted to the Board prior to submitting a reissuance application.
6. Respondent agrees that failure to timely comply with any terms of this agreement and Consent Order shall be deemed sufficient grounds for revocation of her certificate.

CONSENTED TO THIS THE 14th DAY OF November, 2014

Juliana Chiu Smith
Respondent

APPROVED BY THE BOARD THIS THE 15 DAY OF Dec, 2014

NORTH CAROLINA STATE BOARD OF CERTIFIED
PUBLIC ACCOUNTANT EXAMINERS



BY: Wiley W. Jones
President

NORTH CAROLINA
WAKE COUNTY

BEFORE THE NORTH CAROLINA STATE BOARD OF
CERTIFIED PUBLIC ACCOUNTANT EXAMINERS
CASE #: C2014243

IN THE MATTER OF:
Beverly Schain, #16741
Respondent

CONSENT ORDER

THIS CAUSE, coming before the Board at its offices at 1101 Oberlin Road, Raleigh, Wake County, North Carolina, with a quorum present. Pursuant to N.C. Gen. Stat. § 150B-41, the Board and Respondent stipulate to the following Findings:

1. Respondent is the holder of North Carolina certificate number 16741 as a Certified Public Accountant.
2. Respondent informed the Board on her 2013-2014 individual certificate Renewal ("Renewal") that between January 1, 2012, and June 30, 2013, she had obtained the requisite forty (40) hours of continuing professional education ("CPE") to meet the 2012 CPE requirements.
3. Based on Respondent's representation, the Board accepted her Renewal.
4. Board staff requested that Respondent provide certificates of completion for the CPE reported to meet her 2012 and 2013 requirements.
5. Respondent could not provide the CPE certificates of completion to the Board as requested. Respondent was unable to provide any documentation for forty (40) hours of continuing professional education ("CPE") taken to meet the 2012 and 2013 CPE requirements.
6. Respondent wishes to resolve this matter by consent and agrees that the Board staff and counsel may discuss this Consent Order with the Board *ex parte*, whether or not the Board accepts this Consent Order as written. Respondent understands and agrees that this Consent Order is subject to review and approval by the Board and is not effective until approved by the Board at a duly constituted Board meeting.

NC BOARD OF

NOV 18 2014

CPA EXAMINERS

BASED upon the foregoing, the Board makes the following Conclusions of Law:

1. Respondent is subject to the provisions of Chapter 93 of the North Carolina General Statutes and Title 21, Chapter 08 of the North Carolina Administrative Code, including the Rules of Professional Ethics and Conduct promulgated and adopted herein by the Board.
2. Respondent's actions as set out above constitute violations of 21 NCAC 08N .0202(a), .0202(b)(3), and .0202(b)(4).
3. Per N.C. Gen. Stat. § 93-12(9) and also by virtue of Respondent's consent to this Order, Respondent is subject to the discipline set forth below.

BASED on the foregoing and in lieu of further proceedings, the Board and Respondent agree to the following Consent Order:

1. Respondent's failure to provide adequate documentation of CPE renders the Renewal insufficient and untimely. Respondent's failure to adequately renew her certificate results in an automatic forfeiture pursuant to N.C. Gen. Stat. § 93-12(15).
2. Respondent must return her certificate to the Board within fifteen (15) days of Respondent's receipt of the Board's notification of its approval of this Consent Order.
3. Respondent may apply for the reissuance of her certificate after one (1) year from the date the Board approves this Consent Order and if Respondent's certificate and the civil penalty required in number five (5) of this Order have been timely received by the Board.
4. Respondent may apply to return her certificate to active status by submission and approval of a reissuance application which includes:
 - a. Application form,
 - b. Payment of the application fee,
 - c. Three (3) moral character affidavits, and
 - d. Eighty (80) hours of CPE in the twelve (12) months preceding the application including an eight (8) hour accountancy law course as offered by the North Carolina Association of CPAs in a group-study format.

NC BOARD OF

NOV 18 2014

CPA EXAMINERS

5. Respondent shall pay a one thousand dollar (\$1,000.00) civil penalty, to be remitted to the Board prior to submitting a reissuance application.
6. Respondent agrees that failure to timely comply with any terms of this agreement and Consent Order shall be deemed sufficient grounds for revocation of her certificate.

CONSENTED TO THIS THE 12th DAY OF November, 2014

Beverly B. Schain
Respondent

APPROVED BY THE BOARD THIS THE 15 DAY OF Dec, 2014

NORTH CAROLINA STATE BOARD OF CERTIFIED
PUBLIC ACCOUNTANT EXAMINERS



BY: Wiley W. Jover
President

NC BOARD OF
NOV 18 2014
CPA EXAMINERS

THE NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC
ACCOUNTANT EXAMINERS

IN THE MATTER OF:

Bryson David Kiser

Respondent, Case #C2014304

NOTICE OF APPARENT VIOLATION &
AGREEMENT TO CEASE AND DESIST

TO THE ABOVE NAMED RESPONDENT:

WHEREAS, the North Carolina State Board of Certified Public Accountant Examiners ("Board") is authorized by N. C. Gen. Stat. § 93-12 (16) to enforce the provisions of the North Carolina Certified Public Accountant Act ("Act") through actions for injunctive relief regarding "a single violation" of this Chapter; and,

WHEREAS, pursuant to N. C. Gen. Stat. § 93-1, "A 'certified public accountant' is a person who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter."

WHEREAS, pursuant to N. C. Gen. Stat. § 93-3, "It shall be unlawful for any person who has not received a certificate of qualification or not been granted a practice privilege under N.C.G.S. §93-10 admitting the person to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant."

WHEREAS, pursuant to N. C. Gen. Stat. § 93-6, "It shall be unlawful for any person to engage in the public practice of accountancy in this State who is not a holder of a certificate as a certified public accountant issued by the Board, unless such person uses the term 'accountant' and only the term 'accountant' in connection with his name on all reports, letters of transmittal, or advice, and on all stationery and documents used in connection with his services as an accountant, and refrains from the use in any manner of any other title or designation in such practice."

WHEREAS, Respondent Bryson David Kiser (hereinafter "Respondent") is not actively licensed as a certified public accountant in North Carolina or otherwise authorized by the Board to use the CPA title in this state, but his principal place of business is in North Carolina.

WHEREAS, Respondent, in May of 2011, applied for, and was granted, "retired" status for his North Carolina CPA license. As part of that application, Respondent agreed that he would not receive any earned compensation in any job or sign any documents as a CPA.

WHEREAS, Respondent, while on retired status, identified himself as a "CPA" to the IRS in order to obtain and/or maintain a PTIN registration. Respondent also identified himself on his Twitter account as a CPA.

NC BOARD OF

NOV 24 2014

CPA EXAMINERS

THE NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC
ACCOUNTANT EXAMINERS

IN THE MATTER OF:

William Daniel Turner, Jr.

Respondent, Case #C2014353

NOTICE OF APPARENT VIOLATION &
AGREEMENT TO CEASE AND DESIST

TO THE ABOVE NAMED RESPONDENT:

WHEREAS, the North Carolina State Board of Certified Public Accountant Examiners ("Board") is authorized by N. C. Gen. Stat. § 93-12 (16) to enforce the provisions of the North Carolina Certified Public Accountant Act ("Act") through actions for injunctive relief regarding "a single violation" of this Chapter; and,

WHEREAS, pursuant to N. C. Gen. Stat. § 93-1, "A 'certified public accountant' is a person who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter."

WHEREAS, pursuant to N. C. Gen. Stat. § 93-3, "It shall be unlawful for any person who has not received a certificate of qualification or not been granted a practice privilege under N.C.G.S. §93-10 admitting the person to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant."

WHEREAS, pursuant to N. C. Gen. Stat. § 93-6, "It shall be unlawful for any person to engage in the public practice of accountancy in this State who is not a holder of a certificate as a certified public accountant issued by the Board, unless such person uses the term 'accountant' and only the term 'accountant' in connection with his name on all reports, letters of transmittal, or advice, and on all stationery and documents used in connection with his services as an accountant, and refrains from the use in any manner of any other title or designation in such practice."

WHEREAS, Respondent William Daniel Turner, Jr. (hereinafter "Respondent"), is not now, nor has he ever been, licensed as a certified public accountant in North Carolina or otherwise authorized by the Board to use the CPA title in this state, but his principal place of business is in North Carolina.

WHEREAS, Respondent, in July of 2010, signed a Notice of Apparent Violation and Demand to Cease and Desist agreeing not to use the title "CPA" and to identify himself only as an "accountant" in North Carolina.

WHEREAS, Respondent identified himself as a "CPA" to the IRS in order to obtain or maintain a PTIN registration.

NC BOARD OF

NOV 20 2014

CPA EXAMINERS

WHEREAS, Respondent has utilized the PTIN to provide tax services to clients while having a principal place of business in the State of North Carolina.

WHEREAS, the aforementioned facts constitute apparent violations of N.C. Gen. Stat. §§ 93-3 and 93-6 and Respondent has been notified of the same.

THEREFORE, Respondent and the North Carolina State Board of Certified Public Accountant Examiners hereby agree that Respondent shall immediately cease and desist from offering or using in any manner the title "CPA" or "Certified Public Accountant" in North Carolina unless and until licensed as a CPA by the North Carolina State Board of Certified Public Accountant Examiners.

North Carolina State Board of Certified Public Accountant Examiners

BY: Robert N. Brooks DATE: 10/22/14
Robert N. Brooks
Executive Director

In lieu of civil proceedings authorized by N. C. Gen. Stat. § 93-12(16), the Board will accept Respondent's consent to this Agreement.

Consented to:

BY: William D Turner Jr DATE: 11/17/14
William Daniel Turner, Jr.
North Carolina State
New Hanover County

Sworn to (or affirmed) and subscribed before me this day by William D. Turner Jr.
[I have personal knowledge of the identity of the principal(s)] [I have seen satisfactory evidence of the principal's identity, by a current state or federal identification with the principal's photograph in the form of a NC Drivers License] [a credible witness has sworn to the identity of the principals William D. Turner Jr.]



Tamica Katzmann
Notary Public Signature

Tamica Katzmann
Notary Public Printed Name

11/17/14
Date

April 20, 2016
My Commission Expires

THE NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC
ACCOUNTANT EXAMINERS

IN THE MATTER OF:
Kelly-Jean Kwiatkowski
Respondent C2014365

NOTICE OF APPARENT VIOLATION &
AGREEMENT TO CEASE AND DESIST

TO THE ABOVE NAMED RESPONDENT:

WHEREAS, the North Carolina State Board of Certified Public Accountant Examiners ("Board") is authorized by N. C. Gen. Stat. § 93-12 (16) to enforce the provisions of the North Carolina Certified Public Accountant Act ("Act") through actions for injunctive relief regarding "a single violation" of this Chapter; and,

WHEREAS, pursuant to N. C. Gen. Stat. § 93-1, "A 'certified public accountant' is a person who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter."

WHEREAS, pursuant to N. C. Gen. Stat. § 93-3, "It shall be unlawful for any person who has not received a certificate of qualification or not been granted a practice privilege under G.S. 93-10 admitting the person to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant."

WHEREAS, pursuant to N. C. Gen. Stat. § 93-6, "It shall be unlawful for any person to engage in the public practice of accountancy in this State who is not a holder of a certificate as a certified public accountant issued by the Board, unless such person uses the term 'accountant' and only the term 'accountant' in connection with his name on all reports, letters of transmittal, or advice, and on all stationery and documents used in connection with his services as an accountant, and refrains from the use in any manner of any other title or designation in such practice."

WHEREAS, Respondent Kelly-Jean Kwiatkowski (hereinafter "Respondent Kwiatkowski") is not now, nor has she ever been, licensed as a certified public accountant in North Carolina; and

WHEREAS, Respondent Kwiatkowski, while residing and working in North Carolina, identified herself as a "CPA" to the IRS in order to obtain or maintain a Preparer Tax Identification Number ("PTIN") registration.

WHEREAS, Respondent Kwiatkowski has utilized the PTIN to provide tax services to clients while having a principal place of business in the State of North Carolina.

NC BOARD OF

MAY 26 2014

RECEIVED

WHEREAS, Respondent Kwiatkowski utilized an email address that implied she was a "CPA."

WHEREAS, Respondent Kwiatkowski identified herself as a "CPA" while residing in North Carolina.

WHEREAS, Respondent Kwiatkowski's use of the title "CPA" or "Certified Public Accountant" could constitute a violation of N. C. Gen. Stat. § 93-3 and § 93-6.

THEREFORE, Respondent Kwiatkowski and the North Carolina State Board of Certified Public Accountant Examiners hereby agree that Respondent shall immediately cease and desist from offering or using in any manner the title "CPA" or "Certified Public Accountant" in North Carolina unless and until licensed as a CPA by the North Carolina State Board of Certified Public Accountant Examiners.

North Carolina State Board of Certified Public Accountant Examiners

BY: Robert N. Brooks DATE: 10/27/14
Robert N. Brooks
Executive Director

In lieu of civil proceedings authorized by N. C. Gen. Stat. § 93-12(16), the Board will accept Respondent's consent to this Agreement.

Consented to:
BY: Kelly-Jean Kwiatkowski DATE: 11/24/14
Kelly-Jean Kwiatkowski

South Carolina State York County
Sworn to (or affirmed) and subscribed before me this day by 11/24/14.
[I have personal knowledge of the identity of the principal(s)] [I have seen satisfactory evidence of the principal's identity, by a current state or federal identification with the principal's photograph in the form of a Drivers License] [a credible witness has sworn to the identity of the principals [Signature]]

Heather Schettler
Notary Public Signature

Notary
Seal

Heather Schettler
Notary Public Printed Name
11/24/14
Date

NC BOARD OF

NOV 26 2014

CPA EXAMINERS

11/30/15
My Commission Expires

North Carolina State Board of Certified Public Accountant Examiners



Resolution

WHEREAS, Ann J. Hinkle was hired as the Receptionist for the North Carolina State Board of Certified Public Accountant Examiners on April 6, 1987;

WHEREAS, she served as Receptionist until April 1, 1990, when she was promoted to Coordinator of the Professional Standards Section of the Board;

WHEREAS, her title was later changed to Manager of the Professional Standards Section of the Board which is her current position;

WHEREAS, during her tenure as Manager of the Professional Standards Section of the Board, she has faithfully and tirelessly served as a valued employee of the Board; as a peer to enforcement staff with other boards of accountancy; and as an advocate for the protection of the public and the best interests of the profession;

BE IT THEREFORE RESOLVED that the members of the North Carolina State Board of Certified Public Accountant Examiners extend their heartfelt thanks to Ann J. Hinkle for her 27 years and 8 months of dedicated service to the Board in serving the public interest and the profession and extend best wishes to her on her upcoming retirement on December 31, 2014.

This the 15th day of December 2014.

*North Carolina State Board of
Certified Public Accountant Examiners*

Miley W. Glover

Miley W. Glover, CPA, President



Financial Highlights
For the Nine Month Period Ended December 31, 2014
Compared to the Nine Month Period Ended December 31, 2013

	Budget Var.	Dec-14	Dec-13	Inc. (Dec.)
Total Revenue	\$118,939.33	\$ 2,458,328.92	\$ 2,329,033.23	\$ 129,295.69
■ Total Operating Revenue	\$120,259.22	\$ 2,418,290.09	\$ 2,279,964.24	\$ 138,325.85
❖ Total Net Non Operating Revenue	-\$1,319.89	\$ 40,038.83	\$ 49,068.99	\$ (9,030.16)
○ Total Expenses	-\$8,089.50	\$ 2,058,429.08	\$ 1,906,888.35	\$ 151,540.73
Increase(Dec.) Net Assets for Period		\$ 399,899.84	\$ 422,144.88	\$ (22,245.04)
Total Checking and Savings		\$ 708,897.43	\$ 899,137.49	\$ (190,240.06)
Total Assets		\$ 3,361,569.07	\$ 3,226,797.58	\$ 134,771.49
Full-Time/Part-time Employees		14/1	13/1	1/0

Operating revenue was \$120,000 over budget primarily due to increased exam fee revenue.

Non-Operating revenue was \$1,300 under budget due to reduced usage of gift cards.

Actual expenses were \$8,000 under budget, primarily due to reduced board travel costs.

- Total operating revenue increased this period compared to prior by \$138,000 primarily due to an increase in exam fee revenue (\$111k) and certificate fees (\$25k)
- ❖ Total net non-operating revenue decreased this period compared to prior by \$9,000 primarily due to reduced gift card usage (\$6k) and interest income (\$3.5k).
- Total expenses increased this period compared to prior by \$152,000 primarily due to increased exam fee costs (\$100k), building expenses (\$11k), and payment of civil penalties due (\$22k).

NC Board of CPA Examiners
Statement of Net Position
 As of December 31, 2014

	Dec 31, 14	Dec 31, 13
ASSETS		
Current Assets		
Checking/Savings		
1075 · Union - Money Market	245,000.00	0.00
1074 · Trust Atlantic Bank - MMA	244,363.12	487,481.89
1023 · BB&T Disciplinary Clearing Acct	0.00	18,725.00
1020 · BB&T Checking Acct	124,842.70	203,741.13
1021 · BB&T Savings Account	94,591.61	189,089.47
1030 · BB&T Payroll Acct	100.00	100.00
Total Checking/Savings	708,897.43	899,137.49
Other Current Assets		
1110 · Accrued CD Interest	6,533.64	11,633.50
1050 · CD Investments - Current	983,269.23	454,558.79
1165 · Deferred Lease Commissions	1,236.24	3,090.84
1126 · Accts Rec Admin Cost	0.00	5,700.00
1125 · Accts Rec Civil Penalties	1,000.00	2,100.00
1120 · Accounts Receivable	-250.00	286.69
1121 · Returned Checks	0.00	36.00
Total Other Current Assets	991,789.11	477,405.82
Total Current Assets	1,700,686.54	1,376,543.31
Fixed Assets		
1330 · Land Improvement	9,240.90	9,240.90
1300 · Building	922,543.10	917,143.10
1305 · Land	300,000.00	300,000.00
1306 · Vehicle	26,622.40	26,622.40
1310 · Furniture	113,918.90	113,918.90
1320 · Equipment	193,139.75	198,504.64
1325 · Data Base Software	180,336.18	180,336.18
1390 · Accumulated Depreciation	-780,570.50	-735,245.66
Total Fixed Assets	965,230.73	1,010,520.46
Other Assets		
1250 · CD Investments Non-Current	695,651.80	839,733.81
Total Other Assets	695,651.80	839,733.81
TOTAL ASSETS	3,361,569.07	3,226,797.58
LIABILITIES & NET ASSETS		
Liabilities		
Current Liabilities		
Other Current Liabilities		
2040 · Accounts Payable Civil Penalty	900.00	1,890.00
2005 · Due to Exam Vendors	443,217.60	393,472.15
2011 · Accounts Payable Other	2,500.00	0.00
2015 · Accrued Vacation Current	6,444.67	25,435.87
Total Other Current Liabilities	453,062.27	420,798.02
Total Current Liabilities	453,062.27	420,798.02

01/09/15

NC Board of CPA Examiners
Statement of Net Position
As of December 31, 2014

	Dec 31, 14	Dec 31, 13
Long Term Liabilities		
2020 - Accrued Vacation	72,148.92	64,207.91
Total Long Term Liabilities	72,148.92	64,207.91
Total Liabilities	525,211.19	485,005.93
Net Assets		
3010 - Net Assets Invest in Cap Assets	965,230.73	1,010,520.46
3020 - Designated for Capital Assets	100,000.00	100,000.00
3031 - Designated-Operating Expenses	300,000.00	300,000.00
3040 - Designated for Litigation	750,000.00	750,000.00
3900 - Net Assets Undesignated	321,227.31	159,126.31
Change in Net Assets	399,899.84	422,144.88
Total Net Assets	2,836,357.88	2,741,791.65
TOTAL LIABILITIES & NET ASSETS	3,361,569.07	3,226,797.58

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expense - Budget v. Actual
 April 2014 through December 2014

	Apr - Dec 14	Budget	\$ Over Bud...
Ordinary Income/Expense			
Income			
Certificate Fees			
4110 · Certificates - Initial	46,725.00	45,000.00	1,725.00
4120 · Certificates - Reciprocal	22,500.00	20,625.03	1,874.97
4121 · Certificates - Recip/Temp	0.00	0.00	0.00
4130 · Certificates - Temporary	0.00	0.00	0.00
4131 · Certificates - Temp Renewal	0.00	0.00	0.00
4140 · Certificates - Renewal Fees	1,178,520.00	1,187,040.00	-8,520.00
4150 · Certificates - Reinst/Revoked	1,900.00	0.00	1,900.00
4151 · Certificates - Reinst/Surr	3,200.00	9,375.03	-6,175.03
4152 · Certificates - Reinst/Retired	0.00	0.00	0.00
4160 · Certificates - Notification	0.00	0.00	0.00
4161 · Certificate - Notification Rnwl	0.00	0.00	0.00
Total Certificate Fees	1,252,845.00	1,262,040.06	-9,195.06
Exam Fee Revenue			
4001 · Initial Adm Fees	170,660.00	149,212.53	21,447.47
4002 · Re-Exam Adm Fees	123,000.00	115,875.00	7,125.00
4004 · Exam Fees Revenue	813,720.85	749,999.97	63,720.88
4060 · Equivalency Exam Fees	0.00	0.00	0.00
4070 · Transfer Exam Grade Credit	150.00	0.00	150.00
4071 · Exam Review Fees	900.00	0.00	900.00
4072 · Exam Scholarship Coupon	-21,099.76	-30,930.03	9,830.27
Total Exam Fee Revenue	1,087,331.09	984,157.47	103,173.62
Misc			
4910 · Educational Program Fees	24.00	0.00	24.00
4970 · Duplicate Certificates	700.00	0.00	700.00
4980 · Copies	0.00	0.00	0.00
4990 · Miscellaneous	660.00	1,125.00	-465.00
Total Misc	1,384.00	1,125.00	259.00
Partnership Fees			
4260 · Partnership Registration Fees	70.00	0.00	70.00
4261 · Partnership Renewal Fees	36,160.00	24,333.34	11,826.66
Total Partnership Fees	36,230.00	24,333.34	11,896.66
Professional Corporation Fees			
4250 · PC Registration Fees	3,650.00	3,375.00	275.00
4251 · PC Renewal Fees	36,850.00	23,000.00	13,850.00
4252 · PC Renewal Fees W/Penalties	0.00	0.00	0.00
Total Professional Corporation Fees	40,500.00	26,375.00	14,125.00
Total Income	2,418,290.09	2,298,030.87	120,259.22
Expense			
6900 · Bad Debit Expense	0.00	0.00	0.00
6690 · Over & Short	-0.99	0.00	-0.99

NC Board of CPA Examiners
Statement of Revenues & Expense - Budget v. Actual
 April 2014 through December 2014

	<u>Apr - Dec 14</u>	<u>Budget</u>	<u>\$ Over Bud...</u>
Fringe Benefits			
5031 · Retirement - NCLB Contribution	41,628.72	40,738.50	890.22
5033 · Retirement - NCLB Administr	759.53	1,333.34	-573.81
5035 · Health Ins. Premiums	82,623.78	103,500.00	-20,876.22
5036 · Medical Reim Plan	25,721.48	29,250.00	-3,528.52
5038 · Unemployment Claims	277.13	0.00	277.13
Total Fringe Benefits	151,010.64	174,821.84	-23,811.20
Board Travel			
5120 · Board Travel - Board Meetings	11,491.85	14,670.00	-3,178.15
5121 · Board Travel - Prof Meetings	156.80	0.00	156.80
5122 · Board Travel - NASBA Annual	10,681.29	19,495.00	-8,813.71
5123 · Board Travel - NASBA Regional	7,096.96	8,075.00	-978.04
5124 · Board Travel - NASBA Committees	0.00	0.00	0.00
5125 · Board Travel - AICPA/NASBA	0.00	500.00	-500.00
5126 · Board Travel - NCACPA Annual	0.00	0.00	0.00
5127 · Board Travel - NCACPA/Board	824.95	0.00	824.95
5128 · Board Travel - AICPA Committees	0.00	0.00	0.00
5129 · Miscellaneous Board Costs	3,037.81	0.00	3,037.81
5133 · Board Travel - NASBA CPE	0.00	0.00	0.00
Total Board Travel	33,289.66	42,740.00	-9,450.34
Building Expenses			
5800 · Building Maintenance	8,495.75	9,050.00	-554.25
5801 · Electricity	7,709.85	9,000.00	-1,290.15
5802 · Grounds Maintenance	1,400.51	4,500.00	-3,099.49
5803 · Heat & Air Maintenance	5,026.97	6,375.00	-1,348.03
5804 · Improvements	514.50	0.00	514.50
5805 · Insurance	3,983.00	4,300.00	-317.00
5807 · Janitorial Maintenance	4,302.46	4,500.00	-197.54
5808 · Pest Control Service	125.00	200.00	-75.00
5809 · Security & Fire Alarm	2,199.41	2,500.00	-300.59
5810 · Trash Collection	508.37	0.00	508.37
5811 · Water & Sewer	672.32	825.03	-152.71
Total Building Expenses	34,938.14	41,250.03	-6,311.89
Continuing Education -Staff			
5050 · Continuing Education - Staff	2,532.00	4,576.40	-2,044.40
5051 · Continuing Education - RNB	60.00	0.00	60.00
5052 · Continuing Education - Computer	0.00	0.00	0.00
Total Continuing Education -Staff	2,592.00	4,576.40	-1,984.40
Exam Postage			
5531 · Exam Postage	840.00	1,050.04	-210.04
Total Exam Postage	840.00	1,050.04	-210.04
Exam Printing			
5533 · Exam Printing	0.00	0.00	0.00
Total Exam Printing	0.00	0.00	0.00

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expense - Budget v. Actual
 April 2014 through December 2014

	Apr - Dec 14	Budget	\$ Over Bud...
Exam Sitting and Grading			
5538 · Exam Vendor Expense	754,810.44	693,749.97	61,060.47
Total Exam Sitting and Grading	754,810.44	693,749.97	61,060.47
Exam Supplies			
5532 · Exam Supplies	0.00	0.00	0.00
Total Exam Supplies	0.00	0.00	0.00
Exam Temporary Staff			
5530-10 · Temp Employees - May	0.00	0.00	0.00
5530-20 · Temp Employees - Nov	0.00	0.00	0.00
Total Exam Temporary Staff	0.00	0.00	0.00
Investigation & Hearing Costs			
5220 · Investigator Fees	0.00	0.00	0.00
5221 · Staff Investigation Costs	200.00	0.00	200.00
5222 · Investigation Materials	9,298.22	7,499.97	1,798.25
5230 · Hearing Costs	2,255.13	3,750.03	-1,494.90
5231 · Rule-Making Hearing Costs	978.75	0.00	978.75
5232 · Legal Advertising	0.00	0.00	0.00
5250 · Administrative Cost Assessed	-6,238.60	-1,874.97	-4,363.63
5260 · Civil Penalties Assessed	-52,400.00	-5,625.00	-46,775.00
5261 · Civil Penalties Remitted	46,763.98	0.00	46,763.98
Total Investigation & Hearing Costs	857.48	3,750.03	-2,892.55
Legal Expense			
5140 · Legal Counsel - Administrative	19,525.74	18,000.00	1,525.74
5141 · Legal Counsel - Spec Projects	0.00	0.00	0.00
5210 · Legal Counsel - Prof Standards	0.00	9,000.00	-9,000.00
5211 · Legal Counsel - Litigation	11,425.95	2,500.00	8,925.95
Total Legal Expense	30,951.69	29,500.00	1,451.69
Misc Personnel			
5034 · Misc. Payroll Deduction	0.00	1,125.00	-1,125.00
5037 · HSA Deduction	0.00	0.00	0.00
5090 · Flowers, Gifts, Etc.	72.48	0.00	72.48
5091 · Staff Recruiting	299.00	0.00	299.00
5092 · Misc. Personnel Costs	2,358.42	2,250.00	108.42
Total Misc Personnel	2,729.90	3,375.00	-645.10
Office Expense			
5301 · Equipment Rent	467.15	1,200.00	-732.85
5310 · Decorations	252.52	175.00	77.52
5320 · Payroll Service	1,414.71	1,424.97	-10.26
5360 · Telephone	5,815.44	5,249.97	565.47
5361 · Internet & Website	2,969.10	2,999.97	-30.87
5390 · Clipping Service	2,221.87	3,375.00	-1,153.13
5400 · Computer Prog/Assistance	2,260.00	3,750.03	-1,490.03
5405 · Computer Software Maintenance	27,448.83	37,500.03	-10,051.20
5410 · Dues	8,040.00	8,200.00	-160.00
5420 · Insurance	11,979.00	11,900.00	79.00
5430 · Audit Fees	8,475.00	8,475.00	0.00
5435 · Consulting Services	0.00	749.97	-749.97

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expense - Budget v. Actual
 April 2014 through December 2014

	Apr - Dec 14	Budget	\$ Over Bud...
5440 · Misc Office Expense	935.00	3,500.00	-2,565.00
5445 · Banking Fees	2,147.96	2,400.03	-252.07
5450 · Credit Card Fees	39,864.01	33,750.00	6,114.01
Total Office Expense	114,290.59	124,649.97	-10,359.38
Per Diem - Board			
5110 · Per Diem - Board Meetings	6,450.00	10,800.00	-4,350.00
5111 · Per Diem - Prof Meetings	200.00	2,999.97	-2,799.97
5112 · Per Diem - NASBA Annual	1,800.00	4,300.00	-2,500.00
5113 · Per Diem - NASBA Regional	1,350.00	2,000.00	-650.00
5114 · Per Diem - NASBA Committees	250.00	0.00	250.00
5115 · Per Diem - AICPA/NASBA	0.00	0.00	0.00
5116 · Per Diem - NCACPA Annual	0.00	0.00	0.00
5117 · Per Diem - NCACPA/Board	800.00	500.00	300.00
5118 · Per Diem - AICPA Committees	300.00	0.00	300.00
5119 · Per Diem - Miscellaneous	100.00	500.00	-400.00
5130 · Clerical Reimbursement	0.00	0.00	0.00
5135 · Per Diem - NASBA CPE	0.00	0.00	0.00
Total Per Diem - Board	11,250.00	21,099.97	-9,849.97
Postage			
5345 · Postage - UPS	11,300.00	5,000.00	6,300.00
5340 · Postage - Other	4,184.22	10,874.97	-6,690.75
5341 · Postage - Newsletter	56,100.00	49,500.00	6,600.00
5342 · Postage - Business Reply	1,050.00	1,874.97	-824.97
5343 · Postage - Renewal	1,260.00	1,500.03	-240.03
5344 · Postage - Rulebook	0.00	0.00	0.00
Total Postage	73,894.22	68,749.97	5,144.25
Printing			
5330 · Printing - Other	5,901.81	5,249.97	651.84
5331 · Printing - Newsletter	41,220.78	39,750.03	1,470.75
5332 · Printing - Special Projects	0.00	0.00	0.00
5333 · Printing - Renewal	0.00	0.00	0.00
5334 · Printing - Rulebook	0.00	0.00	0.00
5335 · Mailing Label Printing	0.00	0.00	0.00
Total Printing	47,122.59	45,000.00	2,122.59
Repairs & Maintenance			
5380 · Repairs - Misc.	0.00	0.00	0.00
5381 · Maintenance - Copiers	1,835.35	2,625.03	-789.68
5382 · Maintenance - Computer	333.99	2,231.28	-1,897.29
5383 · Maintenance - Postage	50.00	768.78	-718.78
Total Repairs & Maintenance	2,219.34	5,625.09	-3,405.75
Salaries & Payroll Taxes			
5040 · State Unemployment Tax	1,106.18	2,086.47	-980.29
5010 · Staff Salaries	693,809.27	693,831.80	-22.53
5020 · Part-Time Staff Salaries	10,150.38	13,325.66	-3,175.28
5021 · Temporary Contractors	0.00	0.00	0.00
5030 · FICA Taxes	51,068.72	52,989.75	-1,921.03
Total Salaries & Payroll Taxes	756,134.55	762,233.68	-6,099.13

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expense - Budget v. Actual
 April 2014 through December 2014

	Apr - Dec 14	Budget	\$ Over Bud...
Scholarships			
5535 · Scholarship	8,000.00	11,000.00	-3,000.00
Total Scholarships	8,000.00	11,000.00	-3,000.00
Staff Travel			
5060 · Staff Travel - Local	443.22	1,912.50	-1,469.28
5061 · Staff Travel - Prof Mtgs	1,836.07	2,962.53	-1,126.46
5062 · Staff Travel - NASBA CPE	0.00	0.00	0.00
5063 · Staff Travel - NASBA Ethics	0.00	0.00	0.00
5070 · Staff Travel - NASBA Annual	6,081.92	8,355.00	-2,273.08
5071 · Staff Travel - NASBA Regional	4,795.37	5,304.00	-508.63
5072 · Staff Travel - NASBA Administr	0.00	0.00	0.00
5073 · Staff Travel - NASBA Committee	-486.80	0.00	-486.80
5074 · Staff Travel - AICPA	0.00	1,125.00	-1,125.00
5075 · Staff Travel - NCACPA Annual	30.72	0.00	30.72
5076 · Staff Travel - NCACPA/Board	159.50	0.00	159.50
5077 · Staff Travel - Clear Conference	1,186.57	0.00	1,186.57
5078 · Staff Travel - Vehicle	4,947.62	4,500.00	447.62
5080 · Staff Travel - Univ Dialogue	0.00	0.00	0.00
Total Staff Travel	18,994.19	24,159.03	-5,164.84
Subscriptions/References			
5370 · Subscriptions/References	4,315.15	1,500.03	2,815.12
Total Subscriptions/References	4,315.15	1,500.03	2,815.12
Supplies			
5350 · Supplies - Office	7,554.29	3,375.00	4,179.29
5351 · Supplies - Copier	1,576.20	2,062.53	-486.33
5352 · Supplies - Computer	1,059.00	2,250.00	-1,191.00
5353 · Supplies - Special Projects	0.00	0.00	0.00
Total Supplies	10,189.49	7,687.53	2,501.96
5920 · Funded Depreciation	0.00	0.00	0.00
6999 · Uncategorized Expenses	0.00	0.00	0.00
9999 · Suspense	0.00	0.00	0.00
Total Expense	2,058,429.08	2,066,518.58	-8,089.50
Net Ordinary Income	359,861.01	231,512.29	128,348.72
Other Income/Expense			
Other Income			
8250 · Gift Card Revenue	1,650.00	5,250.00	-3,600.00
Interest Income			
8500 · Interest Income - MMAs	1,340.03	0.00	1,340.03
8505 · Interest Income - BB&T BUS IDA	0.00	0.00	0.00
8510 · Interest Income - CDs	10,317.10	11,999.97	-1,682.87
8520 · Interest Income - Prudential TB	0.00	0.00	0.00
8530 · Interest Income - Wachovia MM	0.00	0.00	0.00
Total Interest Income	11,657.13	11,999.97	-342.84

01/09/15

Statement of Revenues & Expense - Budget v. Actual

April 2014 through December 2014

	<u>Apr - Dec 14</u>	<u>Budget</u>	<u>\$ Over Bud...</u>
8200 · Rental Income	26,681.70	24,108.75	2,572.95
8920 · Gain on Sale of Fixed Assets	50.00	0.00	50.00
8921 · Loss on Sale of Fixed Assets	0.00	0.00	0.00
Total Other Income	<u>40,038.83</u>	<u>41,358.72</u>	<u>-1,319.89</u>
Other Expense			
7000 · Leasing Commission	0.00	0.00	0.00
Total Other Expense	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
Net Other Income	<u>40,038.83</u>	<u>41,358.72</u>	<u>-1,319.89</u>
Change in Net Assets	<u><u>399,899.84</u></u>	<u><u>272,871.01</u></u>	<u><u>127,028.83</u></u>

NC Board of CPA Examiners
Statement of Revenues & Expenses
 Year-to-Date Comparison

	Apr - Dec 14	Apr - Dec 13
Ordinary Income/Expense		
Income		
Certificate Fees		
4110 · Certificates - Initial	46,725.00	41,200.00
4120 · Certificates - Reciprocal	22,500.00	22,000.00
4140 · Certificates - Renewal Fees	1,178,520.00	1,153,680.00
4150 · Certificates - Reinst/Revoked	1,900.00	2,300.00
4151 · Certificates - Reinst/Surr	3,200.00	5,600.00
4152 · Certificates - Reinst/Retired	0.00	2,320.00
Total Certificate Fees	<u>1,252,845.00</u>	<u>1,227,100.00</u>
Exam Fee Revenue		
4001 · Initial Adm Fees	170,660.00	140,990.00
4002 · Re-Exam Adm Fees	123,000.00	120,225.00
4004 · Exam Fees Revenue	813,720.85	727,518.25
4070 · Transfer Exam Grade Credit	150.00	0.00
4071 · Exam Review Fees	900.00	1,700.00
4072 · Exam Scholarship Coupon	-21,099.76	-14,309.76
Total Exam Fee Revenue	<u>1,087,331.09</u>	<u>976,123.49</u>
Misc		
4910 · Educational Program Fees	24.00	0.00
4970 · Duplicate Certificates	700.00	775.00
4990 · Miscellaneous	660.00	475.75
Total Misc	<u>1,384.00</u>	<u>1,250.75</u>
Partnership Fees		
4260 · Partnership Registration Fees	70.00	0.00
4261 · Partnership Renewal Fees	36,160.00	38,560.00
Total Partnership Fees	<u>36,230.00</u>	<u>38,560.00</u>
Professional Corporation Fees		
4250 · PC Registration Fees	3,650.00	3,650.00
4251 · PC Renewal Fees	36,850.00	33,250.00
4252 · PC Renewal Fees W/Penalties	0.00	30.00
Total Professional Corporation Fees	<u>40,500.00</u>	<u>36,930.00</u>
Total Income	2,418,290.09	2,279,964.24
Expense		
6690 · Over & Short	-0.99	-2.04
Fringe Benefits		
5031 · Retirement - NCLB Contribution	41,628.72	42,158.96
5033 · Retirement - NCLB Administr	759.53	615.11
5035 · Health Ins. Premiums	82,623.78	80,796.09
5036 · Medical Reim Plan	25,721.48	26,877.46
5038 · Unemployment Claims	277.13	1,059.21
Total Fringe Benefits	<u>151,010.64</u>	<u>151,506.83</u>

NC Board of CPA Examiners
Statement of Revenues & Expenses
 Year-to-Date Comparison

	Apr - Dec 14	Apr - Dec 13
Board Travel		
5120 · Board Travel - Board Meetings	11,491.85	12,311.11
5121 · Board Travel - Prof Meetings	156.80	591.54
5122 · Board Travel - NASBA Annual	10,681.29	11,657.29
5123 · Board Travel - NASBA Regional	7,096.96	2,751.55
5127 · Board Travel - NCACPA/Board	824.95	1,688.14
5129 · Miscellaneous Board Costs	3,037.81	2,395.76
Total Board Travel	33,289.66	31,395.39
Building Expenses		
5800 · Building Maintenance	8,495.75	419.82
5801 · Electricity	7,709.85	6,796.35
5802 · Grounds Maintenance	1,400.51	3,293.00
5803 · Heat & Air Maintenance	5,026.97	2,346.00
5804 · Improvements	514.50	0.00
5805 · Insurance	3,983.00	3,818.00
5807 · Janitorial Maintenance	4,302.46	4,275.00
5808 · Pest Control Service	125.00	0.00
5809 · Security & Fire Alarm	2,199.41	2,024.03
5810 · Trash Collection	508.37	316.05
5811 · Water & Sewer	672.32	679.34
Total Building Expenses	34,938.14	23,967.59
Continuing Education -Staff		
5050 · Continuing Education - Staff	2,532.00	3,869.97
5051 · Continuing Education - RNB	60.00	313.44
Total Continuing Education -Staff	2,592.00	4,183.41
Exam Postage		
5531 · Exam Postage	840.00	720.00
Total Exam Postage	840.00	720.00
Exam Sitting and Grading		
5538 · Exam Vendor Expense	754,810.44	654,320.50
Total Exam Sitting and Grading	754,810.44	654,320.50
Investigation & Hearing Costs		
5221 · Staff Investigation Costs	200.00	0.00
5222 · Investigation Materials	9,298.22	7,680.04
5230 · Hearing Costs	2,255.13	1,537.85
5231 · Rule-Making Hearing Costs	978.75	299.35
5250 · Administrative Cost Assessed	-6,238.60	-14,744.10
5260 · Civil Penalties Assessed	-52,400.00	-30,500.00
5261 · Civil Penalties Remitted	46,763.98	13,572.38
Total Investigation & Hearing Costs	857.48	-22,154.48
Legal Expense		
5140 · Legal Counsel - Administrative	19,525.74	17,792.66
5210 · Legal Counsel - Prof Standards	0.00	735.00
5211 · Legal Counsel - Litigation	11,425.95	0.00
Total Legal Expense	30,951.69	18,527.66

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expenses
 Year-to-Date Comparison

	Apr - Dec 14	Apr - Dec 13
Misc Personnel		
5034 · Misc. Payroll Deduction	0.00	0.00
5037 · HSA Deduction	0.00	0.00
5090 · Flowers, Gifts, Etc.	72.48	159.22
5091 · Staff Recruiting	299.00	299.00
5092 · Misc. Personnel Costs	2,358.42	3,942.18
Total Misc Personnel	2,729.90	4,400.40
Office Expense		
5301 · Equipment Rent	467.15	889.81
5310 · Decorations	252.52	178.33
5320 · Payroll Service	1,414.71	1,286.17
5360 · Telephone	5,815.44	4,397.51
5361 · Internet & Website	2,969.10	2,969.10
5390 · Clipping Service	2,221.87	2,663.32
5400 · Computer Prog/Assistance	2,260.00	2,829.99
5405 · Computer Software Maintenance	27,448.83	34,719.80
5410 · Dues	8,040.00	7,810.00
5420 · Insurance	11,979.00	11,935.00
5430 · Audit Fees	8,475.00	7,700.00
5440 · Misc Office Expense	935.00	4,780.00
5445 · Banking Fees	2,147.96	2,017.80
5450 · Credit Card Fees	39,864.01	37,985.61
Total Office Expense	114,290.59	122,162.44
Per Diem - Board		
5110 · Per Diem - Board Meetings	6,450.00	8,250.00
5111 · Per Diem - Prof Meetings	200.00	0.00
5112 · Per Diem - NASBA Annual	1,800.00	2,300.00
5113 · Per Diem - NASBA Regional	1,350.00	1,100.00
5114 · Per Diem - NASBA Committees	250.00	400.00
5117 · Per Diem - NCACPA/Board	800.00	200.00
5118 · Per Diem - AICPA Committees	300.00	0.00
5119 · Per Diem - Miscellaneous	100.00	0.00
Total Per Diem - Board	11,250.00	12,250.00
Postage		
5345 · Postage - UPS	11,300.00	8,692.70
5340 · Postage - Other	4,184.22	3,744.82
5341 · Postage - Newsletter	56,100.00	54,250.00
5342 · Postage - Business Reply	1,050.00	900.00
5343 · Postage - Renewal	1,260.00	1,080.00
Total Postage	73,894.22	68,667.52
Printing		
5330 · Printing - Other	5,901.81	6,306.94
5331 · Printing - Newsletter	41,220.78	37,423.40
Total Printing	47,122.59	43,730.34

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expenses
 Year-to-Date Comparison

	Apr - Dec 14	Apr - Dec 13
Repairs & Maintenance		
5381 · Maintenance - Copiers	1,835.35	1,376.45
5382 · Maintenance - Computer	333.99	0.00
5383 · Maintenance - Postage	50.00	550.00
Total Repairs & Maintenance	2,219.34	1,926.45
Salaries & Payroll Taxes		
5040 · State Unemployment Tax	1,106.18	370.20
5010 · Staff Salaries	693,809.27	703,315.86
5020 · Part-Time Staff Salaries	10,150.38	8,321.00
5021 · Temporary Contractors	0.00	0.00
5030 · FICA Taxes	51,068.72	52,051.98
Total Salaries & Payroll Taxes	756,134.55	764,059.04
Scholarships		
5535 · Scholarship	8,000.00	2,000.00
Total Scholarships	8,000.00	2,000.00
Staff Travel		
5060 · Staff Travel - Local	443.22	191.69
5061 · Staff Travel - Prof Mtgs	1,836.07	510.40
5070 · Staff Travel - NASBA Annual	6,081.92	6,778.10
5071 · Staff Travel - NASBA Regional	4,795.37	5,448.86
5072 · Staff Travel - NASBA Administr	0.00	9.00
5073 · Staff Travel - NASBA Committee	-486.80	33.90
5075 · Staff Travel - NCACPA Annual	30.72	336.00
5076 · Staff Travel - NCACPA/Board	159.50	42.00
5077 · Staff Travel - Clear Conference	1,186.57	0.00
5078 · Staff Travel - Vehicle	4,947.62	4,268.43
Total Staff Travel	18,994.19	17,618.38
Subscriptions/References		
5370 · Subscriptions/References	4,315.15	735.90
Total Subscriptions/References	4,315.15	735.90
Supplies		
5350 · Supplies - Office	7,554.29	3,203.07
5351 · Supplies - Copier	1,576.20	2,214.00
5352 · Supplies - Computer	1,059.00	1,455.95
Total Supplies	10,189.49	6,873.02
9999 · Suspense	0.00	0.00
Total Expense	2,058,429.08	1,906,888.35
Net Ordinary Income	359,861.01	373,075.89
Other Income/Expense		
Other Income		
8250 · Gift Card Revenue	1,650.00	7,700.00

01/09/15

NC Board of CPA Examiners
Statement of Revenues & Expenses
Year-to-Date Comparison

	Apr - Dec 14	Apr - Dec 13
Interest Income		
8500 · Interest Income - MMAs	1,340.03	1,202.08
8510 · Interest Income - CDs	10,317.10	14,027.41
Total Interest Income	11,657.13	15,229.49
8200 · Rental Income	26,681.70	25,904.50
8920 · Gain on Sale of Fixed Assets	50.00	235.00
Total Other Income	40,038.83	49,068.99
Net Other Income	40,038.83	49,068.99
Change in Net Assets	<u>399,899.84</u>	<u>422,144.88</u>

21 NCAC 08G .0409 is proposed to be amended as follows:

21 NCAC 08G .0409 COMPUTATION OF CPE CREDITS

(a) Group Courses: Non-College. CPE credit for a group course that is not part of a college curriculum shall be given based on contact hours. A contact hour shall be 50 minutes of ~~instruction. One-half credit instruction and one-half contact hour~~ shall be equal to 25 minutes of instruction. ~~after the first credit hour has been earned in a formal learning activity.~~ For example, a group course lasting 100 minutes shall be two contact hours equaling two CPE credits. A group course lasting 75 minutes shall be one and one-half contact hours equaling one and one-half CPE credits. A group course lasting 25 minutes shall be one-half contact hour and equal to one-half CPE credit. When individual segments of a group course are less than 50 minutes, the sum of the individual segments shall be added to determine the number of contact hours. For example, five 30-minute presentations shall be 150 minutes, which shall be three contact hours and three CPE credits. No credit shall be allowed for a segment unless the participant completes the entire segment. Internet based programs shall employ a monitoring mechanism to verify that participants are participating during the duration of the course. No credit shall be allowed for a group course having fewer than 25 minutes of course instruction.

(b) Completing a College Course. CPE credit for completing a college course in the college curriculum shall be granted based on the number of credit hours the college gives the CPA for completing the course. One semester hour of college credit shall be 15 CPE credits; one quarter hour of college credit shall be 10 CPE credits; and one continuing education unit shall be 10 CPE credits. No CPE credit shall be given to a CPA who audits a college course.

(c) Self Study. CPE credit for a self-study course shall be given based on the average number of contact hours needed to complete the course. The average completion time shall be allowed for CPE credit. A sponsor ~~must~~ shall determine on the basis of pre-tests or NASBA word count formula the average number of contact hours of course material it takes to complete a course. A contact hour shall be 50 minutes and one-half contact hour shall be 25 minutes of course material. No self-study course may contain less than 25 minutes of course material.

(d) Instructing a CPE Course. CPE credit for teaching or presenting a CPE course for CPAs shall be given based on the number of contact hours spent in preparing and presenting the course. No more than 50 percent of the CPE credits required for a year shall be credits for preparing for and presenting CPE courses. CPE credit for preparing or presenting a course shall be allowed only once a year for a course presented more than once in the same year by the same CPA.

(e) Authoring a Publication. CPE credit for published articles and books shall be given based on the number of contact hours the CPA spent writing the article or book. No more than 25 percent of a CPA's required CPE credits for a year shall be credits for published articles or books. An article written for a CPA's client or business newsletter shall not receive CPE credit.

(f) Instructing a Graduate Level College Course. CPE credit for instructing a graduate level college course shall be given based on the number of credit hours the college gives a student for successfully completing the course, using

1 the calculation set forth in Paragraph (b) of this Rule. Credit shall not be given for instructing a course in which
2 there is credit given towards an undergraduate degree.

3 (g) No more than 50 percent of the CPE credits required for a year shall be credits claimed under Paragraph (d) and
4 (f) of this Rule.

5 *History Note: Authority G.S. 93-12(8b);*

6 *Eff. May 1, 1989;*

7 *Amended Eff. July 1, 2015; January 1, 2014; February 1, 2012; January 1, 2007; January 1,*
8 *2004; February 1, 1996; April 1, 1994; March 1, 1990.*

No. _____

TWENTY-FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

COMMSCOPE CREDIT UNION,

Plaintiff,

v.

BUTLER & BURKE, LLP, a North
Carolina Limited Liability
Partnership,Defendant/Third Party
Plaintiff,

v.

BARRY D. GRAHAM, JAMES L.
WRIGHT, ED DUTTON, FRANK
GENTRY, GERAL HOLLAR, JOE
CRESIMORE, MARK HONEYCUTT,
ROSE SIPE, TODD POPE, JASON
CUSHING, and SCOTT SAUNDERS,

Third-Party Defendants.

From Catawba County

COA14-273

DEFENDANT/THIRD-PARTY PLAINTIFF BUTLER & BURKE, LLP'S
 PETITION FOR DISCRETIONARY REVIEW
 (N.C. R. App. P. 15; N.C. Gen. Stat. § 7A-31)

INDEX

TABLE OF CASES AND AUTHORITIES	iv
STATEMENT OF THE CASE & THE FACTS	2
I. THE PARTIES AND THE PROCEDURAL BACKGROUND ..	2
II. THE FACTUAL ALLEGATIONS OF THE COMPLAINT ...	4
REASONS WHY CERTIFICATION SHOULD ISSUE	7
I. THE COURT OF APPEALS' FIDUCIARY DUTY RULING IS CONTRARY TO THIS COURT'S PRECEDENT AND PRESENTS ISSUES OF SIGNIFICANT PUBLIC INTEREST.	9
A. THE DECISION BELOW MISAPPLIES THIS COURT'S PRECEDENT, WHICH NARROWLY APPROACHES FIDUCIARY RELATIONSHIPS ...	10
B. THE COURT OF APPEALS' DECISION MISAPPREHENDS THE ROLE OF AN INDEPENDENT AUDITOR AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF AUTHORITY NATIONWIDE.	14
II. THE COURT OF APPEALS' CONTRIBUTORY NEGLIGENCE AND <i>IN PARI DELICTO</i> RULINGS ARE IN CONFLICT WITH THIS COURT'S DECISIONS AND INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.	22
A. COMMSCOPE'S ACKNOWLEDGED FAILURES MUST CONSTITUTE EITHER INTENTIONAL WRONGDOING OR NEGLIGENCE, AND THUS MUST BAR RECOVERY UNDER THE RULINGS OF THIS COURT.	23
B. THE COURT OF APPEALS' RULING IS CONTRARY TO THIS COURT'S IMPUTATION PRECEDENT.	25
C. THE COURT OF APPEALS' RULING FUNDAMENTALLY REALLOCATES THE RESPONSIBILITIES OF AUDITOR AND CLIENT IN A MANNER CONTRARY TO MANDATORY PROFESSIONAL STANDARDS AND THE CONTRACT OF THE PARTIES.	27

ISSUES TO BE BRIEFED.....	29
CERTIFICATE OF SERVICE.....	31
TABLE OF CONTENTS FOR APPENDIX.....	i

TABLE OF CASES AND AUTHORITIES

CASES

<i>Abbitt v. Gregory</i> , 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)	11
<i>Barrett v. Jacobs</i> , 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), <i>disc. rev. denied</i> , 345 N.C. 340, 483 S.E.2d 161 (1997)	24
<i>Byers v. Byers</i> , 223 N.C. 85, 90, 25 S.E.2d 466, 469-70 (1943)	24
<i>Cobo v. Raba</i> , 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998)	24
<i>Dallaire v. Bank of Am., N.A., _____ N.C. _____</i> , 760 S.E.2d 263, 266 (N.C. 2014)	11, 13
<i>Dalton v. Camp</i> , 353 N.C. 647, 651, 548 S.E.2d 704, 708 (2001)	11
<i>FDIC v. Schoenberger</i> , 781 F. Supp. 1155, 1157-58 (1992)	18
<i>Harrold v. Dowd</i> , 149 N.C. App. 777, 779, 561 S.E.2d 914, 916-17 (2002)	15
<i>Hice v. Hi-Mil, Inc.</i> , 301 N.C. 647, 654, 273 S.E.2d 268, 272 (1981)	26
<i>Hogan v. Forsyth Country Club Co.</i> , 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (1986) ..	25, 26
<i>In re Cendent Corp. Secs. Litig.</i> , 139 F. Supp. 2d 585, 608 (D.N.J. 2001)	19
<i>In re Smartalk Teleservs., Inc. Sec. Litig.</i> , 487 F. Supp. 2d 928, 932 (S.D. Ohio 2007)	19
<i>Jackson v. McBride</i> , 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967)	23
<i>Jenkins Bros. Shoe Co. v. Renfrow</i> , 151 N.C. 323, 323, 66 S.E. 212, 214 (1909)	26
<i>Wachovia Bank & Trust Co. v. Johnston</i> , 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967)	18

<i>Marcus Bros. Textiles v. Price Waterhouse, LLP</i> , 350 N.C. 214, 217-18, 513 S.E.2d 320, 323 (1999)	15
<i>Micro Enhancement Int'l Inc. v. Coopers & Lybrand, LLP</i> , 40 P.3d 1206, 1218 (Wash. Ct. App. 2002)	17
<i>Miller v. McLean</i> , 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960)	12
<i>Raritan River Steel Co. v. Cherry, Bekaert & Holland</i> , 322 N.C. 200, 207, 367 S.E.2d 609, 613 (1988)	15, 17
<i>Resolution Trust Corp. v. KPMG Peat Marwick</i> , 844 F. Supp. 431, 436 (N.D. Ill. 1994)	18
<i>Ryan v. Univ. of N. Carolina Hosps.</i> , 168 N.C. App. 729, at *4, 609 S.E.2d 498 (2005)	12
<i>Sharp v. Teague</i> , 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994)	24
<i>Skinner v. E.F. Hutton & Co.</i> , 314 N.C. 267, 271, 333 S.E.2d 236, 239 (1985)	24
<i>Sledge Lumber Corp. v. So. Builders Equip. Co.</i> , 257 N.C. 435, 439, 126 S.E.2d 97, 100 (1962)	26
<i>Smith v. Underwood</i> , 127 N.C. App. 1, 6-7, 487 S.E.2d 807, 811 (1997)	15
<i>TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants</i> , 366 F. Supp. 2d 1212, 1227 (S.D. Ga. 2004) overruled on other grounds, 260 F. App'x 191 (11th Cir. 2007)	17
<i>United States v. Arthur Young & Co.</i> , 465 U.S. 805, 819 n.15 (1984)	21
<i>Wachovia Bank & Trust Co. v. Johnston</i> , 269 N.C. 701, 711, 153 S.E.2d 449 (1967)	12
<i>Wegner v. Delly-Land Delicatessen, Inc.</i> , 270 N.C. 62, 66, 153 S.E.2d 804, 808 (1967)	26

STATUTES

N.C. Gen. Stat. § 7A-31	2, 4, 29
N.C. Gen. Stat. § 93-12(9)	16

OTHER AUTHORITIES

21 NCAC 8N .0402	16
21 NCAC 8N .0403(a)-(b)	16
4 NCAC 6C .0305	16

AICPA Auditing Standard AU 110, available at http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00110.pdf	28
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AICPA Auditing Standard AU 220, available at http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00220.pdf	16, 17
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AICPA Auditing Standard AU 311, available at http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00311.pdf	20
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AICPA Auditing Standard AU 333	28
--------------------------------------	----

AICPA Auditing Standard AU-C 210, available at http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00210.pdf	20
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TREATISES

37 C.J.S. Fraud § 6 at 178 (1997)	12
Section 552 of the Restatement (Second) of Torts	17

No. _____

TWENTY-FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

COMMSCOPE CREDIT UNION,

Plaintiff,

v.

BUTLER & BURKE, LLP, a North
Carolina Limited Liability
Partnership,

Defendant/Third Party
Plaintiff,

v.

BARRY D. GRAHAM, JAMES L.
WRIGHT, ED DUTTON, FRANK
GENTRY, GERAL HOLLAR, JOE
CRESIMORE, MARK HONEYCUTT,
ROSE SIPE, TODD POPE, JASON
CUSHING, and SCOTT SAUNDERS,

Third-Party Defendants.

From Catawba County

COA14-273

**DEFENDANT/THIRD-PARTY PLAINTIFF BUTLER & BURKE, LLP'S
PETITION FOR DISCRETIONARY REVIEW
(N.C. R. App. P. 15; N.C.G.S. § 7A-31)**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 15 of the North Carolina Rules of
Appellate Procedure and N.C. Gen. Stat. § 7A-31(c), Petitioner-
Defendant/Third-Party Plaintiff Butler & Burke, LLP ("Butler &

Burke") respectfully petitions this Court to certify for discretionary review the decision of the North Carolina Court of Appeals rendered in *CommScope Credit Union v. Butler & Burke, LLP, et al.*, No. COA14-273, Slip Op. (Nov. 4, 2014). The Court of Appeals held that the trial court erred in dismissing a complaint filed against Butler & Burke by Plaintiff-Respondent CommScope Credit Union ("CommScope"), a North Carolina credit union. The Court of Appeals' decision - which addresses the scope of, and legal basis for, an independent auditor's potential liability for failing to detect a client's repeated failures to file mandatory reports - is in conflict with decisions of this Court, involves subject matter that has significant public interest, and presents legal principles of major importance to the jurisprudence of this State within the meaning of N.C. Gen. Stat. § 7A-31. In support of this petition, Butler & Burke shows the following:

STATEMENT OF THE CASE & THE FACTS

I. THE PARTIES AND THE PROCEDURAL BACKGROUND

After failing to submit mandatory federal tax informational returns for nearly a decade, CommScope filed this action in an attempt to shift the blame for its failures to Butler & Burke, the certified public accounting ("CPA") firm that served as its independent auditor. CommScope admits that its general manager was responsible for filing the tax returns (R. p. 5, Compl.

¶ 5), but nonetheless contends that Butler & Burke should be held liable for the resulting tax penalties because the CPA firm did not discover the general manager's omissions while performing its annual audits.

CommScope filed its complaint against Butler & Burke in Catawba County Superior Court on 8 November 2012, asserting counts for breach of contract, negligence, malpractice, and breach of fiduciary duty. (R. pp. 4-21.) On 28 January 2013, Butler & Burke answered and asserted a number of affirmative defenses, including contributory negligence and *in pari delicto*. (R. pp. 13-21.) By order dated 27 February 2013, the Chief Justice specially assigned this case to Hon. Richard L. Doughton under General Rule of Practice 2.1. (R. p. 106).

Butler & Burke moved to dismiss CommScope's complaint, pursuant to Rules 12(b)(6) and 12(c), on 6 June 2013. (R. pp. 253-73.)¹ The trial court granted Butler & Burke's motion, concluding that the complaint failed to state a claim upon which relief could be granted. (R. pp. 274-76.)

In an opinion filed on 4 November 2014, the Court of Appeals reversed. That Court first held that the allegations of

¹ On 25 February 2013, Butler & Burke filed a third-party complaint against certain directors, officers and supervisory committee members of CommScope. Some of the third-party defendants moved to dismiss the third-party complaint. That motion was denied as moot after the trial court granted Butler & Burke's motion to dismiss and for judgment on the pleadings. (R. p. 275). Neither the allegations of the third-party complaint nor the denial of the third-party defendants' motion to dismiss is relevant to this petition.

the complaint, if true, would establish a fiduciary relationship between CommScope and Butler & Burke sufficient to support a breach of fiduciary duty claim. (Slip. Op. at 6-10.) The Court of Appeals also held that neither the doctrine of *in pari delicto* nor the defense of contributory negligence supported dismissal of CommScope's causes of action. (*Id.* at 10-21). Butler & Burke filed a petition for rehearing, supported by three certificates, on 9 December 2014, which was denied by order dated 19 December 2014. Butler & Burke now petitions for discretionary review of the Court of Appeals' decision.

II. THE FACTUAL ALLEGATIONS OF THE COMPLAINT²

According to the complaint, CommScope retained Butler & Burke from 2001 through 2010 "to provide professional independent audit services[.]" (R. p. 5, Compl. ¶ 6.) Butler & Burke "represented to [CommScope] that it had special expertise in providing auditing advice and services to nonprofit corporations in general and to credit unions in particular." (R. p. 7, Compl. ¶ 16.) Each of Butler & Burke's engagement letters for the years from 2001-2009 stated:

² The Court of Appeals reviewed the trial court's ruling on Butler & Burke's motion pursuant to Rules 12(b)(6) and 12(c). In ruling on either a motion to dismiss or a motion for judgment on the pleadings, the court must treat the allegations in the non-moving party's complaint as true. *E.g., Harris v. NNCB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987); *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Thus, the "facts" for purposes of this petition are those alleged in CommScope's complaint and those found in the documents referenced in the complaint. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001).

The objective of our audit is the expression of an opinion as to whether CommScope Credit Union's financial statements are fairly presented, in all material respects, in conformity with U.S. generally accepted accounting principles ["GAAP"].

. . .

[W]e will plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or governmental regulations that are attributable to the credit union or to acts by management or employees acting on behalf of the credit union.

. . .

Our audit will include obtaining an understanding of internal control sufficient to plan the audit and to determine the nature, timing, and extent of audit procedures to be performed.

(R. p. 7, Compl. ¶ 11; R., p. 259, 7 Jan. 2009 Letter.) The engagement letters stated that CommScope's management was responsible for "identifying and ensuring that the credit union complies with applicable laws and regulations"; for "making all management decisions and performing all management functions"; and "for the fair presentation in the financial statements of financial position, results of operation, and cash flows in conformity with [GAAP]." (R. p. 260, 7 Jan. 2009 Letter).

It is undisputed that CommScope was required by law to file a "Return of Organization Exempt From Income Tax" (the "Form 990"). (R. p. 9, Compl. ¶ 30.) It is also undisputed that CommScope's former general manager failed to file the required

Form 990 for nearly a decade - from 2001 to 2009. (R. p. 5, Compl. ¶ 5.) In 2010, the Internal Revenue Service (the "IRS") notified CommScope of these failures. (R. p. 5, Compl. ¶ 8.) The IRS assessed a penalty of \$424,000 against CommScope, which was later reduced to \$374,200. (R. p. 5, Compl. ¶ 5.)

According to the complaint, Butler & Burke should be held liable for this penalty. CommScope alleges that Butler & Burke failed to request or review CommScope's tax returns as part of its "overall analysis of [CommScope's] financial condition" in performing its audits. (R. p. 7, Compl. ¶ 17.) The complaint further alleges that generally accepted auditing standards required Butler & Burke, as CommScope's auditor, to discover the credit union's violations of federal and state laws. (R. p. 9, Compl. ¶ 29.)³ Based on these alleged failures, the complaint asserts counts for breach of contract, negligence, professional malpractice and breach of fiduciary duty.

Notably, the complaint does not allege that Butler & Burke agreed to do anything more than perform annual independent audits of CommScope's financial statements and render an opinion as to whether those statements were fairly presented, in all material respects, in conformity with GAAP. In particular, there is no allegation that Butler & Burke agreed to prepare or

³ Neither of the decisions below considered whether (as alleged by CommScope) an auditor has a duty to request and examine a client's tax returns. Accordingly, that issue is not addressed in this petition.

file CommScope's tax returns or that Butler & Burke agreed to perform any other accounting or business services for CommScope. (See generally R. pp. 3-12.) To the contrary, the complaint alleges the existence of the standard, garden-variety auditor-client relationship, and nothing more.

REASONS WHY CERTIFICATION SHOULD ISSUE

The opinion below conflicts with this Court's precedent in several respects. Absent review and correction by this Court, the Court of Appeals' decision will have significant and far-reaching adverse consequences for CPAs who provide independent auditing services in North Carolina, as well as for their clients and the many others who rely on audit opinions.

First, by allowing a breach of fiduciary duty claim to proceed on these allegations, the Court of Appeals effectively held that every standard audit engagement in North Carolina gives rise to a fiduciary relationship. This ruling contravenes the prior decisions of this Court, which has always held that fiduciary relationships arise only in certain narrow circumstances not present here.

It is particularly inappropriate to find a fiduciary duty in this context because the duties of a fiduciary cannot be reconciled with the independence and impartiality that are required of auditors under professional auditing standards and governing law. If, as the Court of Appeals held, a standard

audit engagement requires auditors to act solely in the best interests of their clients and otherwise fulfill the duties of a fiduciary, then auditors can no longer truly be either impartial or independent - a result that would have a profound and detrimental impact on the practice of auditing in this State and on the myriad parties who rely on audit opinions. Because auditors can already be held liable for their professional errors under traditional theories of negligence, the interests of audit clients are protected. The Court of Appeals' decision expanding liability to the fiduciary context has no public policy benefit and serves only to undermine the strong public policy of ensuring that auditors issue unbiased opinions.

Second, in rejecting Butler & Burke's defenses of contributory negligence and *in pari delicto*, the Court of Appeals wrongly held that a credit union's failures to file mandatory tax reports for almost a decade could constitute "excusable" conduct that might not be a bar to recovery - a result that cannot be squared with this Court's precedent. The Court of Appeals also erred by holding that, on the type of facts alleged here, the failures of a credit union officer might not be imputable to CommScope itself.

In so ruling, the opinion below again contradicts the established law of this State. It also redefines the basic allocation of responsibility for audited financial statements as

between the client, who is accountable for the representations made in its financial statements, and the independent auditor, who is responsible for expressing an opinion on those statements.

Taken as a whole, the decision below vastly expands the scope of an independent auditor's potential liability and rewrites basic standards of professional auditing. In effect, the Court of Appeals' opinion seeks to turn auditors into guarantors of a client's good management. This is wholly inconsistent with the law in North Carolina. Given that independent auditing is a regulated profession that is vital to the efficient functioning of financial and capital markets, the issues presented by this appeal are of significant public interest, and certification should be allowed.

I. THE COURT OF APPEALS' FIDUCIARY DUTY RULING IS CONTRARY TO THIS COURT'S PRECEDENT AND PRESENTS ISSUES OF SIGNIFICANT PUBLIC INTEREST.

CommScope's complaint alleges the existence of an ordinary auditor-client relationship between CommScope and Butler & Burke. Nothing in the complaint marks that relationship as being different from the relationship that arises in any standard audit engagement. In reversing the trial court, the Court of Appeals held that the allegations of the complaint, if proven, would establish the existence of a fiduciary relationship between CommScope and Butler & Burke.

Under the Court of Appeals' decision, every audit engagement undertaken in North Carolina will give rise to a fiduciary relationship. As explained below, this result is in error for three primary reasons. *First*, it is directly contrary to existing North Carolina law, which is clear that fiduciary relationships arise only in very limited circumstances that are not alleged in the complaint. *Second*, imposing fiduciary duties on auditors is fundamentally inconsistent with the independence and impartiality that auditors are required to maintain under North Carolina law and applicable professional standards - a conflict that has been uniformly recognized by other jurisdictions. *Third*, the opinion below ignores that auditors can already be held accountable for professional errors under traditional theories of negligence.

Given the critical nature of auditors' work and the numerous parties who rely on the credibility of audit opinions, certification is warranted to correct the Court of Appeals' error on an issue of significant public interest.

A. THE DECISION BELOW MISAPPLIES THIS COURT'S PRECEDENT, WHICH NARROWLY APPROACHES FIDUCIARY RELATIONSHIPS.

Due to the substantial obligations that are created by a fiduciary relationship, this Court has consistently taken a circumspect approach to imposing fiduciary duties on parties who are involved in business relationships. In allowing CommScope's

breach of fiduciary duty claim to proceed despite the lack of any allegation that Butler & Burke exerted dominance or control over its client, the Court of Appeals departed from this Court's precedent. This constituted serious error that warrants review.

Time and again, this Court has held that a fiduciary relationship will arise only in certain limited situations - namely, where there is both (1) "'confidence reposed on one side'" and (2) "'resulting domination and influence on the other.'" *Dallaire v. Bank of Am., N.A.*, ____ N.C. ____, 760 S.E.2d 263, 266 (N.C. 2014) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 708 (2001); *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). By contrast, arm's length relationships "do not typically give rise to fiduciary duties." *Dallaire*, 760 S.E.2d at 266. Just last year, this Court again emphasized the limited nature of fiduciary relationships by holding that, unlike the relationship between spouses, partners, or an attorney and her client - all of which are marked by "a heightened level of trust" - the relationship between a creditor and a debtor ordinarily is not fiduciary in nature. *Id.* at 266-67.

This Court's cautious approach to fiduciary relationships reflects the high standards imposed on fiduciaries, who are required "to act in the best interests of the other party." *Id.* at 266; see also *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (a

fiduciary "is bound to act in good faith and with due regard to the interests of the one reposing confidence" (internal quotation marks omitted)). Indeed, this Court has recognized that the fiduciary duty of loyalty is "unbending and inveterate." *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449 (1967) (internal quotation marks omitted). In keeping with the "unbending" nature of the duty of loyalty, fiduciaries "can never paramount their personal interest over the interest of those for whom they have assumed to act." *Miller v. McLean*, 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960); see also *Ryan v. Univ. of N. Carolina Hosps.*, 168 N.C. App. 729, at *4, 609 S.E.2d 498 (2005) (unpublished table decision) (observing that "a fiduciary must act primarily for the benefit of another in matters connected with the undertaking" (citing 37 C.J.S. Fraud § 6 at 178 (1997)).

In the decision below, the Court of Appeals acknowledged that only certain limited types of relationships give rise to fiduciary duties and that this Court has never adopted a per se rule establishing that the accountant-client relationship is fiduciary in nature. (Slip. Op. at 6-8.) The Court of Appeals failed, however, to apply faithfully these very principles. In particular, the Court of Appeals held - with scant analysis or explanation - that the relationship between an auditor and its client is likely fiduciary in nature because it involves the use

of "specially trained professionals" and "appears" to be much more similar to the attorney-client relationship than the relationship between "mutually interdependent businesses" like retailers and suppliers. (*Id.* at 8-9.) The Court of Appeals further held that, even if a fiduciary relationship did not arise as a matter of law, the engagement letters in this case created a fiduciary relationship as a matter of fact because Butler & Burke "sought and received" CommScope's confidence by promising to review its financial statements to identify errors and fraud. (*Id.* at 9-10.)

Glaringly, the Court of Appeals did not even attempt to explain how the complaint's allegations could establish the sort of "dominance" and "control" that is required to give rise to a fiduciary relationship under this Court's precedent. In *Dallaire* - another fiduciary duty case that was wrongly decided by the Court of Appeals and required discretionary review - this Court rejected the borrower's unsupported argument that a lender exerts "total control" over the modern loan origination and securitization process merely because that process involves the use of specially trained professionals with expertise. *Dallaire*, 760 S.E.2d at 265-66.

Likewise here, the Court of Appeals lacked any basis for concluding that the allegations of the complaint, if proven, would show that Butler & Burke exerted any sort of control over

CommScope. To the contrary, the terms of the engagement letters referenced in the complaint emphasized that CommScope's management retained responsibility for, among other things, "making all management decisions and performing all management functions." (R. p. 260, 7 Jan. 2009 Letter). If left undisturbed, the Court of Appeals' decision would dilute the strict test used to establish fiduciary relationships and have a profound impact on North Carolina jurisprudence. For this reason alone, certification should issue.

B. THE COURT OF APPEALS' DECISION MISAPPREHENDS THE ROLE OF AN INDEPENDENT AUDITOR AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF AUTHORITY NATIONWIDE.

In addition to departing from this Court's exacting standards for the imposition of a fiduciary relationship, the Court of Appeals' decision misapprehends the role of an independent auditor vis-à-vis her client, which is fundamentally different from the relationship between an attorney and her client. Fiduciary duties are generally incompatible with the professional standards applicable during an ordinary audit engagement, which is all that has been alleged here. If the Court of Appeals' error is not corrected, North Carolina will be an outlier among jurisdictions nationwide, which have nearly uniformly recognized that imposing fiduciary duties on independent auditors makes no sense and is contrary to sound public policy.

A CPA can be engaged by a client to perform any number of services. Compare, e.g., *Harrold v. Dowd*, 149 N.C. App. 777, 779, 561 S.E.2d 914, 916-17 (2002) (plaintiff engaged the CPA firm "to advise them on business opportunities, including mergers and acquisitions") with *Smith v. Underwood*, 127 N.C. App. 1, 6-7, 487 S.E.2d 807, 811 (1997) (CPA firm performed a variety of accounting work for the plaintiffs, including by preparing tax filings and returns). When a CPA is engaged as an auditor, her primary responsibility is to issue a written report opining about the client's financial statements, which are prepared in the first instance by the client's management - not the auditor. See, e.g., *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 217-18, 513 S.E.2d 320, 323 (1999) (citing *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 207, 367 S.E.2d 609, 613 (1988)). In other words, as an auditor, a CPA does not manage the client's finances or perform accounting services for the client. Rather, the CPA examines the client's accounting procedures and financial reports and issues an opinion as to whether the financial statements present fairly, in all material respects, the client's financial position in conformity with GAAP.

As recognized by the North Carolina Board of Certified Public Accountant Examiners (the "Board"), a CPA firm that is hired to issue an audit report "must be independent with respect

to the client in fact and appearance." 21 NCAC 8N .0402. The auditing standards promulgated by the American Institute of Certified Public Accountants ("AICPA") likewise require that an auditor "be independent" and "without bias with respect to the client since otherwise he would lack that impartiality necessary for the dependability of his findings[.]" AICPA Auditing Standard AU 220, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00220.pdf>.⁴ In other words, the auditor "must be free from any obligation to or interest in the client, its management, or its owners." *Id.* This State's laws regulating credit unions specifically recognize the importance of auditor independence. See 4 NCAC 6C .0305 (requiring credit unions to perform annual audits and noting that "[c]ompensated auditors . . . must be independent of the credit union's employees, members of the board of directors, supervisory committee, credit committee, and/or the credit union's loan officers and members of their immediate families").

This independence is required, in part, because the duties of an independent auditor do not run solely in favor of the auditor's client. Rather, as this Court has held, an independent auditor "owes a duty of care not only to the client but [also] to any other person, or one of a group of persons,

⁴ AICPA Ethical and Auditing Standards have been adopted as mandatory standards by the Board pursuant to its authority under N.C. Gen. Stat. § 93-12(9). See 21 NCAC 8N .0403(a) - (b).

whom the accountant or his client intends the information to benefit." *Raritan*, 322 N.C. at 210, 367 S.E.2d at 615.

(adopting Section 552 of the Restatement (Second) of Torts in the auditing context). These third parties may include, for example, a client's creditors and potential investors or buyers. See, e.g., AICPA Auditing Standard AU 220 (auditor independence is required partly to ensure fairness to "creditors and those who may otherwise rely . . . upon the independent auditor's report, as in the case of prospective owners or creditors").

Based on the independence and impartiality that are required of auditors and the various duties they potentially owe to non-clients, nearly all of the courts to consider the issue have recognized that the duties of a fiduciary are inherently incompatible with the role of an auditor. See, e.g., *TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants*, 366 F. Supp. 2d 1212, 1227 (S.D. Ga. 2004) *overruled on other grounds*, 260 F. App'x 191 (11th Cir. 2007) ("Generally, an accountant hired to audit the financial statements of a client is not a fiduciary of the client, but rather is required to be independent of the client."); *Micro Enhancement Int'l Inc. v. Coopers & Lybrand, LLP*, 40 P.3d 1206, 1218 (Wash. Ct. App. 2002) ("[T]he weight of authority is that absent *special circumstances*, an auditor is *not a fiduciary* of its client. An *independent auditor's* primary duty is to the public and this is

inconsistent with a fiduciary status."); *Resolution Trust Corp. v. KPMG Peat Marwick*, 844 F. Supp. 431, 436 (N.D. Ill. 1994) (in general, "the nature of the independent auditor precludes a finding of fiduciary duty"); *FDIC v. Schoenberger*, 781 F. Supp. 1155, 1157-58 (1992) ("[A]ccountants do not owe a fiduciary duty to their clients when providing services as auditor; rather the nature of an independent auditor is that it will perform the services objectively and impartially.").

The reasoning adopted by these courts is sound. A fiduciary is expected to place the interests of the beneficiary above all else. The classic example is the attorney-client relationship, where the attorney is not independent or impartial but is expected to act as an advocate for the client. An attorney who acts with the interests of others in mind would violate the "unbending" duty of loyalty she owes. *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967). By contrast, an auditor is *required* to be independent and impartial in order to deliver an unbiased opinion about the client's financial condition. Imposing fiduciary duties on auditors would interfere substantially with their ability to comply with professional auditing standards. It would also force auditors into the untenable position of having to choose between fulfilling the duty of loyalty owed to clients and meeting the obligations they potentially owe to third parties

under North Carolina law. Thus, the Court of Appeals' superficial comparison of the auditor-client relationship to the attorney-client relationship is entirely inapt; the two are fundamentally different.

Notably, the complaint does not even attempt to allege the sort of "special circumstances" that have, on occasion, led courts in other jurisdictions to depart from the general rule that an auditor does not owe fiduciary duties to a client. See, e.g., *In re Smarttalk Teleservs., Inc. Sec. Litig.*, 487 F. Supp. 2d 928, 932 (S.D. Ohio 2007) (denying summary judgment on fiduciary duty claim where evidence showed CPA firm "acted on a variety of matters for [the client] beyond mere auditing of financial records"); *In re Cendent Corp. Secs. Litig.*, 139 F. Supp. 2d 585, 608 (D.N.J. 2001) (denying motion to dismiss because complaint alleged CPA firm "went beyond mere[] provision of independent audits" by providing comfort letters in connection with a merger). Rather, as discussed, the complaint reflects an ordinary and entirely typical auditor-client relationship, and alleges nothing that could not be alleged about any relationship between an auditor and her client.

In concluding that the terms of the engagement letters created a fiduciary relationship as a matter of fact, the Court of Appeals demonstrated a fundamental misunderstanding about the usual terms of an audit engagement. The language that the Court

of Appeals relied on to reach its conclusion closely tracks the applicable AICPA standards setting forth what should be included in a standard audit engagement letter.⁵ If the engagement letters here create a fiduciary relationship, then so does every audit engagement letter that adheres to governing professional auditing standards.

The adverse impact of the Court of Appeals' decision is not mitigated because it was rendered at the motion to dismiss stage. Although Butler & Burke strongly denies that it acted negligently in performing its duties as an auditor, it does not dispute the factual allegations of the complaint regarding the task it undertook (performing annual independent audits of CommScope's financial statements) or the terms of the engagement (reflected in entirely standard engagement letters that parrot recognized professional auditing standards). There are no

⁵ The Court of Appeals repeatedly cited the statements in Butler & Burke's engagement letters that the CPA firm would "plan and perform [] audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [CommScope] or to acts by management or employees acting on behalf of [CommScope]." (Slip. Op. at 15.) The auditing standards in place during the time at issue in the complaint likewise require auditors to communicate in an engagement letter that the auditor is responsible for "obtain[ing] reasonable rather than absolute assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." AICPA Auditing Standard AU 311, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00311.pdf>. The current auditing standards actually include an example engagement letter that contains similar language to that included in Butler & Burke's engagement letters. See AICPA Auditing Standard AU-C 210, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00210.pdf>. The engagement letters here thus reflect nothing more than a standard audit engagement.

disputed "special circumstances" alleged in the complaint that may or may not be proven during discovery. Thus, if the Court of Appeals' holding were the law, every CPA undertaking a standard audit engagement in North Carolina would owe fiduciary duties to her client - a rule that would make North Carolina an extreme and isolated outlier and that would seriously undermine the important role independent auditors play in the State's economy.

In sum, the Court of Appeals' fiduciary duty ruling warrants certification for several reasons. Auditors currently fulfill a critical role in the economy of North Carolina, as they do in other States, by offering unbiased opinions about the financial condition of clients to the public (for public companies) and interested third parties (for both public and private companies). *Cf. United States v. Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984) ("Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional."). If the Court of Appeals' ruling stands, however, it will become impossible to tell whether an auditor is acting impartially and independently, in accordance with established professional auditing standards, or if the auditor is skewing her audit opinions to serve the best interests of her client, in compliance with her fiduciary duties. Because this

uncertainty would undoubtedly have widespread ramifications for the North Carolina economy, as well as for the practice of auditing in this State, the Court should allow this petition to correct the Court of Appeals' error.

II. THE COURT OF APPEALS' CONTRIBUTORY NEGLIGENCE AND IN PARI DELICTO RULINGS ARE IN CONFLICT WITH THIS COURT'S DECISIONS AND INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

In addition to its mistaken conclusion about the existence of a fiduciary relationship, the Court of Appeals also held that neither *in pari delicto* nor contributory negligence warranted dismissal of CommScope's complaint and that the conduct of the credit union's general manager might not be imputable to the organization itself. As set forth below, this holding conflicts with this Court's precedent in a number of respects and implicates principles of corporate governance important to the jurisprudence of the State.

First, there is no basis for concluding that CommScope's acknowledged failures to file mandatory tax forms can constitute "excusable" conduct. Second, it is contrary to the well-established precedent of this Court to conclude that the failures of CommScope's officers might not be imputable to the credit union itself. Third, the Court of Appeals' decision improperly redefines the relationship between an auditor and her client, in derogation of professional auditing standards.

**A. COMMScope'S ACKNOWLEDGED FAILURES MUST CONSTITUTE
EITHER INTENTIONAL WRONGDOING OR NEGLIGENCE, AND THUS
MUST BAR RECOVERY UNDER THE RULINGS OF THIS COURT.**

In the opinion below, the Court of Appeals concluded that neither *in pari delicto* nor contributory negligence supported dismissal of the suit in part because it was not clear from the complaint that CommScope's conduct was necessarily negligent or intentionally wrongful. Rather, the Court of Appeals held that CommScope's omissions could fall into a novel and previously unknown third category of "excusable" conduct. (Slip. Op. at 14-19). Under CommScope's own allegations, however, its conduct could not possibly be "excusable."

CommScope's complaint alleges that the credit union had a legal obligation to file the Form 990 (R. p. 9, Compl. ¶ 30) and failed to do so (R. p. 5, Compl. ¶ 5), resulting in a tax penalty of more than \$300,000.00 (R. p. 5, Compl. ¶ 5). These allegations - which must be treated as true - establish the existence of a legal duty, the breach of that duty, and resulting damages. At a minimum, therefore, the complaint establishes that CommScope was contributorily negligent, *i.e.*, that CommScope's own negligence joined with the alleged negligence by Butler & Burke to cause CommScope's injuries. See *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967) (contributory negligence is "negligence on the part of the plaintiff, which joins, simultaneously or successively, with

the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains"). As recognized by this Court, contributory negligence is a complete bar to recovery in negligence. See, e.g., *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998).⁶

The complaint also leaves open the possibility that CommScope acted intentionally in failing to file the required tax returns. In that event, CommScope's claims would fail pursuant to the doctrine of *in pari delicto*. This Court has long recognized that "[t]he law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains." *Byers v. Byers*, 223 N.C. 85, 90, 25 S.E.2d 466, 469-70 (1943). When the plaintiff is equally at fault for the alleged harm, *in pari delicto* acts as a complete bar to recovery. *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 271, 333 S.E.2d 236, 239 (1985).

Thus, whether intentionally wrongful or merely negligent, CommScope's acknowledged omissions bar its recovery as a matter

⁶ Because CommScope's breach of contract count is - like its malpractice and negligence counts - based on allegations that Butler & Burke failed to comply with its professional obligations (see generally R. pp. 6-7, Comp. ¶¶ 9-12.), it sounds in negligence. See *Sharp v. Teague*, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994) ("[C]laims arising out of the performance of or failure to perform professional services based on negligence or breach of contract are in the nature of malpractice claims." (internal quotation marks omitted)). Accordingly, contributory negligence would also serve as a bar to CommScope's contract claim. See *Barrett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (recognizing that contributory negligence can bar a malpractice claim against an accountant).

of law. For the Court of Appeals to allow CommScope's suit to proceed on these allegations is in direct opposition to the well-established jurisprudence of this State, which reflects a clear policy of preventing recovery by parties whose own acts contribute to their harm.

B. THE COURT OF APPEALS' RULING IS CONTRARY TO THIS COURT'S IMPUTATION PRECEDENT.

In addition to its indefensible holding that CommScope's conduct might be "excusable," the Court of Appeals also departed from this Court's precedent by holding that the acknowledged failure of CommScope's general manager to file the Form 990 might not be imputable to CommScope itself. In this regard, the Court of Appeals observed that a principal is responsible for the torts of its agent (1) where the agent's acts are expressly authorized by the principal; (2) where the agent's act is committed within the scope of his employment and in furtherance of the principal's business; and (3) when the agent's act is ratified by the principal." (Slip. Op. at 15 (citing *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (1986)).) The Court of Appeals reasoned that, because it was detrimental to CommScope's interests not to file required tax returns and because it was unlikely that the general manager would have voluntarily notified CommScope of his omissions, this

conduct might not be imputable to CommScope. (Slip. Op. at 15-16.)

The Court of Appeals' reasoning in this regard directly contradicts this Court's rulings regarding agency and respondeat superior. It has long been the law in this State that the acts and omissions of an agent are chargeable to the principal, so long as the agent is acting within the scope of her authority. *See, e.g., Sledge Lumber Corp. v. So. Builders Equip. Co.*, 257 N.C. 435, 439, 126 S.E.2d 97, 100 (1962); *Jenkins Bros. Shoe Co. v. Renfrow*, 151 N.C. 323, 323, 66 S.E. 212, 214 (1909) (knowledge of the agent of a corporation generally is imputed to the corporation itself); *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 654, 273 S.E.2d 268, 272 (1981) (exception to general rule of imputation exists only where the agent acts for his "sole benefit"). Likewise, a principal is generally liable for the acts and omissions of its agents, even if they are "unlawful and unauthorized or even forbidden," so long as "the act of the employee was a means or method of doing that which he was employed to do." *Hogan*, 79 N.C. App. at 491, 340 S.E.2d at 122 (citing *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 66, 153 S.E.2d 804, 808 (1967)).

Contrary to this authority, the Court of Appeals adopted an overly simplistic and mechanical view of what it means to act "in furtherance of the principal's business." By CommScope's

own allegations, its general manager was tasked with filing a tax return and failed to do so. (R. p. 5, Compl. ¶ 5.) It is impossible to apply this Court's precedent faithfully and conclude that CommScope is not chargeable with these acknowledged omissions. If the Court of Appeals' reasoning were adopted as the law in North Carolina, a corporate principal would rarely be held liable for the torts of its agents, and it could escape responsibility in almost every circumstance. It is common sense that an agent's tortious conduct is often, in fact, detrimental to (rather than in furtherance of) the interests of the principal.

C. THE COURT OF APPEALS' RULING FUNDAMENTALLY REALLOCATES THE RESPONSIBILITIES OF AUDITOR AND CLIENT IN A MANNER CONTRARY TO MANDATORY PROFESSIONAL STANDARDS AND THE CONTRACT OF THE PARTIES.

In addition to the potentially widespread implications for North Carolina jurisprudence, the Court of Appeals' opinion would fundamentally change the allocation of responsibility in a standard audit engagement by improperly imposing financial liability on auditors for the client's own omissions and failures. This result is contrary to applicable professional auditing standards and the contractual terms of the audit engagements undertaken by Butler & Burke in this case.

Before beginning any audit, an auditor must ensure that the client understands that (1) the financial statements constitute

a representation of the client's management; (2) the client's management is responsible for the client's accounting policies and internal control procedures; and (3) the auditor's responsibility is only to express an opinion as to whether the financial statements are fairly presented, in all material respects, in conformity with GAAP. See AICPA Auditing Standard AU 110, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00110.pdf>; see also AICPA Auditing Standard AU 333, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00333.pdf> (requiring management to acknowledge affirmatively its responsibilities as a prerequisite to the issuance of an audit report). In this case, the required allocation of responsibility between management and the auditor is reflected both in the engagement letters issued by Butler & Burke (e.g., R. p. 260, 7 Jan. 2009 Letter) and in CommScope's own representation letters (R. pp. 66-92, 119-64).

Despite this clear contractual delineation of responsibilities, the Court of Appeals' opinion would allow audit clients to shift the blame for failing to fulfill basic legal duties, such as filing tax returns, to their auditors. This Court has never endorsed such a result.

In sum, certification should also be allowed as to the Court of Appeals' erroneous rulings on *in pari delicto* and

contributory negligence, which - like the Court of Appeals' fiduciary duty holding - are contrary to the well-established precedent of this Court and involve issues of significance to North Carolina jurisprudence within the meaning of N.C. Gen. Stat. § 7A-31.⁷

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, Butler & Burke intends to present the following issues in its brief to the Court:

1. Did the Court of Appeals err in concluding that an ordinary audit engagement gives rise to a fiduciary relationship between an independent auditor and its client?

2. Did the Court of Appeals err in concluding that a credit union is not barred from recovering against its independent auditor, as a matter of law, under the doctrines of *in pari delicto* and/or contributory negligence, where the complaint acknowledges that the alleged harm resulted from the failure of the credit union's officers to file mandatory annual tax returns for nearly a decade?

⁷ Even if the Court of Appeals' rulings on *in pari delicto* and contributory negligence would not merit discretionary review on their own, which they do, the Court should nonetheless grant certification as to all issues presented by this petition in the interests of judicial economy and to prevent piecemeal litigation.

Respectfully submitted, this the 2 day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEFENDANT/THIRD-PARTY PLAINTIFF BUTLER & BURKE, LLP'S PETITION FOR DISCRETIONARY REVIEW (N.C. R. App. P. 15; N.C. Gen. Stat. § 7A-31) was served upon the parties to this action by electronic mail and by mailing a copy thereof by first-class, postage pre-paid mail to the following counsel of record:

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This the 2 day of January, 2015.

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TABLE OF CONTENTS FOR APPENDIX

CommScope Credit Union v. Butler & Burke, LLP, et al., No. COA14-273, Slip Op. (Nov. 4, 2014)	App. 1-21
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NO. COA14-273

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

COMMSCOPE CREDIT UNION,
Plaintiff,

v.

Catawba County
No. 12 CVS 3021

BUTLER & BURKE, LLP, a North
Carolina Limited Liability
Partnership,
Defendant and Third-Party
Plaintiff,

v.

BARRY D. GRAHAM, JAMES L. WRIGHT,
ED DUTTON, FRANK GENTRY, GERAL
HOLLAR, JOE CRESIMORE, MARK
HONEYCUTT, ROSE SIPE, TODD POPE,
JASON CUSHING, and SCOTT SAUNDERS,
Third-Party Defendants.

Appeal by Plaintiff from order entered 26 September 2013 by
Judge Richard L. Doughton in Catawba County Superior Court.
Heard in the Court of Appeals 27 August 2014.

*Patrick, Harper & Dixon, LLP, by Michael J. Barnett and L.
Oliver Noble, Jr., and Carlton Law PLLC, by Alfred P.
Carlton, Jr., for Plaintiff.*

*Sharpless & Stavola, P.A., by Frederick K. Sharpless, for
Defendant and Third-Party Plaintiff.*

No brief for Third-Party Defendants.

STEPHENS, Judge.

Factual and Procedural Background

Plaintiff Commscope Credit Union is a North Carolina chartered credit union which retained Defendant Butler & Burke, LLP, a certified public accountant firm, in 2001 to provide professional independent audit services. Defendant represented to Plaintiff that it had special expertise in providing auditing services to credit unions and other nonprofit entities. Defendant's engagement letters between 2001 and 2010 asserted that it would, *inter alia*,

plan and perform [audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Each year from 2001 to 2009, Plaintiff's general manger, Mark Honeycutt, failed to file with the Internal Revenue Service ("IRS") a Form 990, Return of Organization Exempt From Income Tax Returns¹ ("the tax forms"). In the course of its audits,

¹ No copy of a Form 990 is included in the record on appeal, but we take judicial notice that this lengthy, multi-page form requires tax-exempt entities to provide detailed information

-3-

Defendant never requested copies of the tax forms, and, as a result, did not discover Plaintiff's failure to file them. In April 2010, the IRS notified Plaintiff of its filing deficiency and later informed Plaintiff that a penalty of \$424,000 had been assessed against it. The penalty was subsequently reduced to \$374,200.

On 8 November 2012, Plaintiff filed a complaint in Catawba County Superior Court against Defendant alleging claims for breach of contract, negligence, breach of fiduciary trust, and professional malpractice.² On 28 January 2013, Defendant answered, asserting several affirmative defenses. Defendant filed a third-party complaint on 25 February 2013 against various individuals who had been directors, officers, and supervisory committee members of Plaintiff.³ That complaint

about their governance, assets, revenue, and expenses, and depending on their specific organizational structure and activities, additional tax schedules may be required to be filed as well. See <http://www.irs.gov/pub/irs-pdf/f990.pdf> (last visited 22 October 2014).

² On 27 February 2013, the Chief Justice designated the matter as a complex business case and assigned the Honorable Richard L. Doughton to preside over it.

³ Among the third-party defendants was Honeycutt, the general manager for Plaintiff who was alleged to have had the responsibility to file the tax forms and to have failed to do so.

-4-

included claims for contribution, indemnity, negligent misrepresentation, and fraud. The third-party defendants answered and asserted various affirmative defenses. Three of the third-party defendants moved to dismiss pursuant to Rule of Civil Procedure 12(b)(6). On 6 June 2013, Defendant moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) and 12(c). On 26 September 2013, the trial court granted Defendant's motion and dismissed the case. This action rendered the third-party defendants' motion to dismiss moot, and the trial court did not consider or rule on that motion. From the order granting Defendant's motion to dismiss, Plaintiff appeals.

Discussion

Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). We agree.

I. Standards of review

When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not

-5-

prove any set of facts to support his claim which would entitle him to relief.

Sharp v. CSX Transp., Inc., 160 N.C. App. 241, 243, 584 S.E.2d 888, 889 (2003) (citations and internal quotation marks omitted). "When the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, however, the motion will be granted and the action dismissed." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985) (citation omitted).

"A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted; emphasis added).

The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). We review de novo a trial court's grant of a motion to dismiss under both Rule 12(b)(6) and 12(c). *Id.*; *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, ___ N.C. App. ___, ___, 752 S.E.2d 661, 663-64 (2013).

II. Breach of fiduciary duty

In its motion to dismiss, Defendant argued that Plaintiff had failed to allege facts or circumstances that, if true, would show the existence of a fiduciary duty Defendant owed to Plaintiff. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Harrold v. Dowd*, 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002) (citation omitted). In this State, fiduciary relationships may arise as a matter of law because of the nature of the relationship, "such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). However, "[o]nly when one party figuratively holds all the cards — all the financial power or technical information, for example — have North Carolina courts found that the special circumstance of a

-7-

fiduciary relationship has arisen." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347-48 (4th Cir. 1998) (internal quotation marks omitted). Thus, our courts have declined to find the existence of a fiduciary relationship between "mutually interdependent businesses," such as a distributor and a manufacturer, or a retailer and its main supplier. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990).

Even where a fiduciary relationship does not arise as a matter of law, such a relationship does exist

when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. It extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Harrold, 149 N.C. App. at 784, 561 S.E.2d at 919 (citations, internal quotation marks, and brackets omitted). For example, in *Harrold*, this Court concluded that no fiduciary relationship existed between a pair of optometrists and an accounting firm hired "to advise them on business opportunities, including mergers and acquisitions." *Id.* at 779, 561 S.E.2d at 917. However, the Court went on to contrast this situation with one

-8-

in which the accountant defendants "had done accounting . . . and had prepared tax filings" such that they "obviously had acquired a special confidence in preparing tax documents for the trusts, corporations, and individual plaintiffs." *Id.* at 784, 561 S.E.2d at 919 (discussing *Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997)). Thus, while this Court in *Harrold* was correct in stating that no North Carolina case has held that an accounting firm and its clients are *per se* in a fiduciary relationship, that case did not concern accountants and their *audit clients*. That is, in *Harrold*, the accounting firm was not providing auditing or accounting services to its clients, but rather was acting as a consultant on mergers and acquisitions. *Id.* at 779, 561 S.E.2d at 917. In *Smith*, on the other hand, where the accountants were providing accounting and tax-related services, a fiduciary relationship *did* exist. 127 N.C. App. at 10, 487 S.E.2d at 813. We would observe that, in using its specially trained professionals to perform comprehensive audits for credit unions, accounting firms such as Defendant would appear "to hold all the . . . technical information" *Broussard*, 155 F.3d at 348. In our view, the relationship between Plaintiff and Defendant appears much more like that between "attorney and

-9-

client, broker and principal," see *Abbitt*, 201 N.C. at 598, 160 S.E. at 906, than that between "mutually interdependent businesses," like distributors and manufacturers, or retailers and suppliers. See *Tin Originals, Inc.*, 98 N.C. App. at 666, 391 S.E.2d at 833.

More importantly, even if the relationship between an accounting firm and its audit clients is not a fiduciary one as a matter of law, Plaintiff's complaint alleges that Defendant pledged to

plan and perform [audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

In assuring Plaintiff that it had the expertise to review financial statements to identify "errors [and] fraud[,] " even by Plaintiff's own management and employees, Defendant sought and received "special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." See *Harrold*, 149 N.C. App. at 784, 561 S.E.2d at 919. We conclude that, in the light most favorable to Plaintiff, the allegations

-10-

of the complaint are sufficient to state a claim for breach of fiduciary duty. Accordingly, the trial court erred in dismissing Plaintiff's claim.

III. Plaintiff's remaining claims

As for Plaintiff's claims for breach of contract, negligence, and professional malpractice, Defendant moved to dismiss under the doctrines of (1) *in pari delicto* and (2) contributory negligence, as well as upon contentions that these claims are (3) barred by the explicit terms of Defendant's engagement letter. We are not persuaded.

A. In pari delicto

"The common law defense by which [Defendant] seek[s] to shield [itself] from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [defendentis] or 'in a case of equal or mutual fault the condition of the party in possession [or defending] is the better one.'" See *Skinner*, 314 N.C. at 270, 333 S.E.2d at 239 (citation and ellipsis omitted). "Our courts have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same

-11-

matter whereof he complains." *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009) (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). Our Supreme Court has observed "that the *in pari delicto* defense traditionally has been *narrowly limited* to situations in which the plaintiff was *equally at fault* with the defendant." *Skinner*, 314 N.C. at 272, 333 S.E.2d at 240 (emphasis in original); see also *Cauble v. Trexler*, 227 N.C. 307, 313, 42 S.E.2d 77, 81-82 (1947) (noting that where "the parties are to some extent involved in the illegality, - in some degree affected with the unlawful taint, - but are not *in pari delicto*, - that is, both have not, with the same knowledge, willingness, and wrongful intent engaged in the transaction, or the undertakings of each are not equally blameworthy, - a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent") (citation and internal quotation marks omitted; emphasis added).

The courts of our State have not yet addressed the applicability of *in pari delicto* as a defense by accountants to the malpractice-related claims of their auditing clients, but, in *Whiteheart*, this Court considered the doctrine's

-12-

applicability as a defense in legal malpractice cases. There, the plaintiff, who was in the business of billboard advertising,

sent a letter to his various competitors "alerting" them about Ms. Payne. In this letter, [the] plaintiff asserted that Ms. Payne was a "lease jumper" and that she and her business practices were unprofessional, unethical, and despicable. [The p]laintiff also referred to Ms. Payne personally in additional derogatory terms. Although [the] plaintiff's attorney, Betty Waller ("[the] defendant"), reviewed the letter before it was sent, she failed to advise [the] plaintiff of the potential liability that could result from sending such a *per se* defamatory document.

199 N.C. App. at 282, 681 S.E.2d at 420. After Ms. Payne and another entity successfully sued the plaintiff and received judgments totaling over \$700,000, the plaintiff sued Betty Waller and her law firm "for legal malpractice, seeking to recover damages sufficient to cover the judgments" against him. *Id.* at 283, 681 S.E.2d at 421. This Court noted that the successful tort cases against the plaintiff had "establish[ed] as a matter of law [the plaintiff's] *intentional wrongdoing*" in sending the letters. *Id.* at 284, 681 S.E.2d at 421 (emphasis added). This Court also cited the reasoning of other state courts in cases where the doctrine was applied to bar claims against attorneys when their clients had knowingly engaged in intentional wrongdoing:

-13-

Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996) (plaintiffs' malpractice claim dismissed because they acted *in pari delicto* with defendant law firm in knowingly making false statements in affidavits submitted to Patent and Trademark Office); *Evans v. Cameron*, 121 Wis. 2d 421, 360 N.W.2d 25 (1985) (plaintiff's malpractice action barred by defense of *in pari delicto* where the client lied under oath in a bankruptcy proceeding about transferring money to her mother, even though she claimed her testimony was based upon the advice of her attorney); *Robins v. Lasky*, 123 Ill. App.3d 194, 201-02, 462 N.E.2d 774, 779, 78 Ill. Dec. 655 (1984) (plaintiff's malpractice action barred by defense of *in pari delicto* when he followed defendant attorneys' advice to relocate and establish his permanent residence in another state in order to avoid service of process in Illinois).

Id. at 285, 681 S.E.2d at 422 (emphasis added). Noting with approval that "some courts have distinguished between wrongdoing that would be obvious to the plaintiff and legal matters so complex that a client could follow an attorney's advice, do wrong[,] and still maintain suit on the basis of not being equally at fault[,]" the panel in *Whiteheart* held that such fine distinctions were not necessary in that case because the plaintiff had engaged in intentional wrongdoing, to wit, knowingly lying in an affidavit filed in the courts of our State and knowingly spreading lies about Ms. Payne among the business

-14-

community in an effort to harm her. *Id.* at 285-86, 681 S.E.2d at 422-23 (citation and internal quotation marks omitted).

Here, Defendant urges that the doctrine applies because the action of Honeycutt, Plaintiff's general manager, in failing to file the tax forms (1) may be imputed to Plaintiff and (2) was an equal and mutual wrong to any negligence, breach of contract, or malpractice in Defendant's auditing process and procedures. However, unlike in *Whiteheart* or the other cases cited *supra*, nothing in Plaintiff's complaint establishes that Honeycutt's failure to file the tax forms was an example of intentional wrongdoing, as opposed to negligence, or for that matter, that Honeycutt's alleged failure was not excusable conduct.⁴

⁴ We note that a copy of the complaint filed by Plaintiff against Honeycutt in a separate legal action alleges, *inter alia*, both negligence and fraud in connection with his failure to file the tax forms. This complaint, however, appears in the record on appeal as an attachment to Defendant's response to Plaintiff's motion for exceptional case designation and assignment of this matter to the North Carolina Business Court and was not part of Plaintiff's complaint for consideration under Rule 12(b)(6) nor part of the pleadings before the trial court in considering Defendant's motion to dismiss under Rule 12(c). In any event, even were it part of the pleadings properly before and considered by the trial court in deciding Defendant's motion to dismiss, the alternate allegations in Plaintiff's complaint against Honeycutt standing alone would not support the application of *in pari delicto* as a defense by Defendant against Plaintiff.

-15-

Nor do the allegations in the complaint establish as a matter of law that Honeycutt's failure to file the tax forms may be imputed to Plaintiff.

As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (citation omitted), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In addition,

[w]here the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply.

Sparks v. Union Trust Co. of Shelby, 256 N.C. 478, 482, 124 S.E.2d 365, 368 (1962) (citation and internal quotation marks omitted).

Here, the complaint certainly does not establish that Plaintiff expressly authorized Honeycutt's failure to file the tax forms nor that it ratified this omission after the fact. To

-16-

the extent any inference is raised by the facts alleged in Plaintiff's complaint, it would be that Honeycutt's failure to file the tax forms did not further Plaintiff's business, and Honeycutt's conduct raises a clear presumption that he would not communicate the situation to Plaintiff. If Plaintiff was exempt from paying taxes by the filing of the tax forms and if the failure to file the forms has resulted in a nearly \$400,000 penalty assessment, Honeycutt's conduct not only did not further Plaintiff's business, it actively harmed Plaintiff. In sum, at the present stage of the case, Defendant is not entitled to a dismissal of Plaintiff's breach of contract, malpractice, and negligence claims on the basis of *in pari delicto*.

B. Contributory negligence

Defendant also moved to dismiss based upon an argument that Plaintiff's claims were barred by its own contributory negligence, as imputed from Honeycutt's failure to file the tax forms and his lies and omissions to Defendant and others about Plaintiff's tax compliance.

Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. It does not negate negligence of the defendant as alleged in the complaint,

-17-

but presupposes or concedes such negligence by him. *Contributory negligence by the plaintiff can exist only as a co-ordinate or counterpart of negligence by the defendant as alleged in the complaint.*

Jackson v. McBride, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967) (citations, internal quotation marks, and emphasis omitted). Contributory negligence will act as a complete defense to malpractice claims against accountants. See *Bartlett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997). However, in considering the propriety of submission of the issue of contributory negligence to the jury, our Supreme Court has observed:

The allegation in an answer that the [tort] was caused by [the plaintiff's] own negligence and not by any negligence of the defendant is not a sufficient plea of contributory negligence. For the same reason, evidence by the defendant to the effect that the plaintiff was injured not by the negligence of the defendant, as alleged in the complaint, but by the plaintiff's own negligence, as alleged in the answer, would not justify the submission to the jury of an issue of contributory negligence.

Jackson, 270 N.C. at 372, 154 S.E.2d at 471-72 (citation and internal quotation marks omitted; emphasis omitted).

Plaintiff cites *Smith* for the proposition that contributory negligence is inapplicable given the facts here. That case held

-18-

that, "[i]n an action by a principal against an agent, the agent cannot impute his own negligence to the principal. Where the negligence of two agents concurs to cause injury to the principal, the agents cannot impute the negligence of the fellow agent to bar recovery." 127 N.C. App. at 14, 487 S.E.2d at 816 (citations omitted). Plaintiff fails to cite the next sentence in that opinion: "However, if either defendant is found to be an independent contractor, that defendant would not be barred from imputing the agent's negligence to [the] plaintiff." *Id.* (citation omitted). The allegations of Plaintiff's complaint, taken as true, establish *prima facie* that Defendant is an independent contractor. See *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 345, 601 S.E.2d 915, 923 (2004) ("An independent contractor . . . is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.") (citations and internal quotation marks omitted).

However, we agree with Plaintiff's assertion that the doctrine of contributory negligence is inapplicable here, albeit for a much simpler reason. As noted *supra*, nothing in the pleadings establishes either that Honeycutt's failure to file

-19-

the tax returns was (1) negligent rather than intentional wrongdoing or excusable conduct or (2) imputed to Plaintiff as a matter of law. Further, Defendant's answer simply alleges that any harm to Plaintiff "was caused by [Plaintiff's] own negligence and not by any negligence of [D]efendant [which] is not a sufficient plea of contributory negligence." See *Jackson*, 270 N.C. at 372, 154 S.E.2d at 472.

C. Terms of the engagement letter

In its motion to dismiss, Defendant also argued that Plaintiff's claims were barred as attempts "to hold [D]efendant[] liable for matters which the parties expressly agreed [P]laintiff was responsible." We disagree.

A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury. Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was. If the meaning of the contract is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Majestic Cinema Holdings, LLC v. High Point Cinema, LLC, 191 N.C. App. 163, 165-66, 662 S.E.2d 20, 22 (citations, internal

-20-

quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 29 (2008).

The engagement letters sent by Defendant to Plaintiff each year used substantially identical language in describing Plaintiff's responsibilities:

Management is responsible for making all management decisions and performing all management functions; for establishing and maintaining internal controls, including monitoring ongoing activities; for making all financial records and related information available to us and for the accuracy and completeness of that information[;] and for identifying and ensuring that the credit union complies with applicable laws and regulations.

However, as noted *supra*, in the same letters, Defendant explicitly took on the responsibility to

plan and perform [audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Thus, the plain language of the engagement letters appears to give the parties overlapping, if not conflicting, responsibilities for the very types of situations, actions, and

-21-

omissions as lie at the heart of this case. This "writing leaves it uncertain as to what the agreement was" and when "the intention of the parties is unclear. . . , interpretation of the contract is for the jury." See *id.* at 165, 662 S.E.2d at 22. Plaintiff and Defendant have made conflicting arguments about what various administrative code sections and standard auditing procedures require with respect to the duties of an auditor and its client, but, on the pleadings, and in the absence of expert testimony or any other evidence, we cannot evaluate their contentions.

In sum, Plaintiff has stated its claims sufficiently to withstand Defendant's motion to dismiss, Defendant has not established any affirmative defenses which would entitle it to dismissal, and Defendant has failed to "clearly establish[] that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." See *B. Kelley Enters., Inc.*, 211 N.C. App. at 593, 710 S.E.2d at 336 (citation and internal quotation marks omitted). Accordingly, the trial court erred in granting Defendant's motion to dismiss, and the order so doing is

REVERSED.

Judges CALABRIA and ELMORE concur.

No. 5P15

TWENTY-FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

COMMSCOPE CREDIT UNION,

)

)

Plaintiff-Respondent

)

)

v.

)

From Catawba County

)

12 CVS 3021

BUTLER & BURKE, LLP, a North
Carolina Limited Liability Partnership,

)

)

)

Defendant-Petitioner

)

)

v.

)

)

BARRY D. GRAHAM et al.,

)

)

Third-Party Defendants

)

**BRIEF OF AMICI CURIAE NORTH CAROLINA ASSOCIATION
OF CERTIFIED PUBLIC ACCOUNTANTS (NCACPA) AND AMERICAN
INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (AICPA)
IN SUPPORT OF PETITIONER**

INDEX

TABLES OF CASES AND AUTHORITIES	iii
INTERESTS OF AMICI CURIAE IN THIS MATTER	1
ARGUMENT	4
I. INDEPENDENCE IN AUDITING IS THE BEDROCK OF PUBLIC ACCOUNTING PRACTICE.....	4
A. Independence in auditing is mandated by North Carolina law and ethical standards in the accounting profession.	6
B. Independence is also a fundamental requirement in federal law and international standards.	8
C. The Court of Appeals erred by equating an audit relationship with a fiduciary relationship.	9
II. RECOGNIZING THE IMPORTANCE OF INDEPENDENCE, COURTS HAVE HELD THAT THE AUDIT RELATIONSHIP IS NOT A FIDUCIARY RELATIONSHIP AS A MATTER OF LAW.....	11
III. THE DECISION OF THE COURT OF APPEALS COULD NEGATIVELY IMPAIR THE AVAILABILITY OF INDEPENDENT AUDITS IN NORTH CAROLINA.	13
IV. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED ON ALL ISSUES.....	16
CONCLUSION	16

APPENDIX

21 NCAC 08N.0402	App. 1
21 NCAC 08N.0403	App.2
AICPA Auditing Standard AU-C § 200 (excerpts).....	App.3
AICPA Auditing Standard AU § 220	App.8
AICPA ET § 100 (excerpts)	App.10
17 C.F.R. § 210-2.01	App.23
17 C.F.R. § 240.10A-2	App.36
IESBA Code § 290 (excerpt).....	App.37
<i>Wright v. Sutton</i> , 2011 WL 1232607 (S.D. W. Va. 2011)	App.40
<i>Strategic Capital Resources v. Citrin Cooperman & Company, LLP</i> , 213 Fed. App'x 842 (11th Cir. 2007)	App.47

TABLES OF CASES AND AUTHORITIES

Cases

<i>Abbitt v. Gregory</i> , 201 N.C. 577, 160 S.E. 896 (1931).....	5
<i>Compton v. Kirby</i> , 158 N.C. App. 19, 581 S.E.2d 452 (2003).....	5
<i>FDIC v. Schoenberger</i> , 781 F. Supp. 1155 (E.D. La. 1992).....	12
<i>Franklin Supply Co. v. Tolman</i> , 454 F.2d 1059 (9th Cir 1971).....	12
<i>Harrold v. Dowd</i> , 149 N.C. App. 777, 561 S.E.2d 914 (2002).....	11
<i>Resolution Trust Corp. v. KPMG Peat Marwick</i> , 844 F. Supp. 431 (N.D. Ill. 1994).....	11, 12, 13
<i>Smith v. Underwood</i> , 127 N.C. App. 1, 487 S.E.2d 807 (1997).....	11
<i>Strategic Capital Resources v. Citrin Cooperman & Company, LLP</i> , 213 Fed. App'x 842 (11th Cir. 2007) (App. 47).....	12
<i>U.S. v. Arthur Young & Co.</i> , 465 U.S. 805 (1984).....	10
<i>Wright v. Sutton</i> , 2011 WL 1322607, (S.D. W. Va. 2011) (App. 40).....	12

Statutes

15 U.S.C. § 78j-1; Public Law 107-204, 116 Stat. 745.....	9
N.C. Gen. Stat. § 54-109.49	9

Rules

04 NCAC 06C.0305	9, 15
------------------------	-------

21 NCAC 08A.0301(b)(6).....	4
21 NCAC 08N.0402	6
21 NCAC 08N.0403	6
17 C.F.R. § 210.2-02(b).....	8
17 C.F.R. § 210-2.01	8
17 C.F.R. § 240.10A-2	8
AICPA Auditing Standard AU § 220.....	6-7, 11
AICPA Auditing Standard AU-C § 200.04.....	4
AICPA Code of Professional Conduct.....	8
AICPA Code 1.200.....	8
AICPA Code 1.295.115.....	8
AICPA ET § 100-1.14.....	8
AICPA ET §101.05	8

Other Authorities

AICPA, <i>Audits by Certified Public Accountants: Their Nature and Significance</i> (1950).....	5
Berryman, R. Glen. <i>Auditor Independence: Its Historical Development and some Proposals for Research, in Contemporary Auditing Problems</i> (1974).....	5
Restatement (Second) Torts § 874 cmt. a (1979).....	5

No. 5P15

TWENTY-FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

COMMSCOPE CREDIT UNION,

)

)

Plaintiff-Respondent

)

)

v.

)

From Catawba County

)

12 CVS 3021

BUTLER & BURKE, LLP, a North
Carolina Limited Liability Partnership,

)

)

)

Defendant-Petitioner

)

)

v.

)

)

BARRY D. GRAHAM et al.,

)

)

Third-Party Defendants

)

**BRIEF OF AMICI CURIAE NORTH CAROLINA ASSOCIATION
OF CERTIFIED PUBLIC ACCOUNTANTS (NCACPA) AND AMERICAN
INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (AICPA)
IN SUPPORT OF PETITIONER**

Interests of Amici Curiae In This Matter

The North Carolina Association of Certified Public Accountants (NCACPA) is an organization dedicated to promoting the competence, integrity, civic responsibility, and success of CPAs in North Carolina. Since its founding in 1919, it has grown to over 14,000 members, serving all aspects of the accounting

profession. NCACPA's services include a comprehensive curriculum of professional education, and a commitment to maintaining the highest standards of professional excellence in accounting practice in North Carolina.

NCACPA's committees, chapters, task forces, and advisory groups regularly interact with the North Carolina State Board of CPA Examiners, American Institute of Certified Public Accountants, Financial Accounting Standards Board, Internal Revenue Service, and other regulators who shape state and national accounting standards. Based on its role, history, and experience as a member service organization for North Carolina CPAs, NCACPA has a strong interest in issues affecting the independence of auditors.

The American Institute of Certified Public Accountants (AICPA) is the world's largest member association representing the accounting profession, with approximately 400,000 members in 128 countries, and a 126-year history of service to the public interest. AICPA's diverse membership represents many areas of practice, including public accounting, business and industry, government, education, and consulting. AICPA has been an authoritative source in the development of accounting and auditing standards and issuing professional publications to improve the quality of services provided by CPAs. Because of its historical role in formulating standards related to audits and other professional

engagements, and the reports issued thereon, the AICPA maintains a strong interest in the scope and bases of civil liability sought to be imposed on accountants.

Neither NCACPA nor AICPA has a direct stake in this particular dispute. However, because of their extensive understanding of the accounting profession and commitment to the public interest, these organizations are deeply concerned on behalf of their members and the public about the decision of the Court of Appeals in this case, particularly as it relates to a significant misunderstanding of auditor independence, a fundamental component of an auditor's responsibilities. As discussed below, the Court of Appeals' holding that an auditor may owe a fiduciary duty to an audit client cannot be reconciled with professional auditing standards and North Carolina law, which mandate an auditor be independent of the audit client. It also departs from settled precedent in other jurisdictions recognizing the public policy supporting independent audits and holding that the auditor-client relationship by its nature cannot be a fiduciary one.

Amici respectfully submit that the Court of Appeals' opinion involves legal principles of major significance and the subject matter is one of significant public interest, thus meriting this Court's review. The decision of the Court of Appeals creates confusion regarding whether North Carolina CPAs may conduct independent audits and further may impair the ability of North Carolina CPAs to continue to perform independent audits that are important to North Carolina

businesses, their creditors, and North Carolina's economy as a whole. NCACPA and AICPA therefore respectfully submit this brief of *amici curiae* to request that this Court grant Butler & Burke, LLP's Petition for Discretionary Review and uphold longstanding principles of auditor independence.

ARGUMENT

I. INDEPENDENCE IN AUDITING IS THE BEDROCK OF PUBLIC ACCOUNTING PRACTICE.

As a preliminary matter, it is important for the Court to note that an “auditor” is a specific kind of accountant. While accountants generally may be associated with the preparation and filing of personal and business tax returns, auditors perform a substantively different and valuable service. An “audit” is “a professional service whereby a CPA is engaged to examine financial statements . . . in order to express an opinion on whether the financial statements . . . are presented in conformity with generally accepted accounting principles or other comprehensive basis of accounting.” 21 NCAC 08A.0301(b)(6). Audits are intended to “enhance the degree of confidence that intended users can place in the financial statements.” AICPA Auditing Standard AU-C § 200.04. As discussed below, audits are conducted in accordance with specific professional standards, referred to as “Generally Accepted Auditing Standards” (“GAAS”).

The independence of an auditor is the critical foundation of the modern practice of auditing. The need for independent audits has been recognized since at

least the mid-18th century,¹ coincident with the growth and importance of corporations in commerce. Since at least 1950, AICPA publications have described independence as “both historically and philosophically ... the foundation of the public accounting profession.”²

A fiduciary relationship is not one of independence, but rather a relationship where one party is bound to act in the interests of another. A fiduciary relationship “exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931); *Compton v. Kirby*, 158 N.C. App. 19, 581 S.E.2d 452 (2003); Restatement (Second) of Torts § 874 cmt. a (1979) (“A fiduciary relation exists between two persons when one of them is under a duty to act or to give advice for the benefit of another upon matters within the scope of the relation.”)

As further explained below, the requirement of auditor independence is mandated by professional standards, as well as state and federal law in many instances, such that when an auditor is engaged to provide an audit, that relationship *cannot* be fiduciary. The two concepts are mutually exclusive.

¹ See Berryman, R. Glen. *Auditor Independence: Its Historical Development and some Proposals for Research*, in Contemporary Auditing Problems (1974).

² AICPA, *Audits by Certified Public Accountants: Their Nature and Significance* (1950), p.25.

A. Independence in auditing is mandated by North Carolina law and ethical standards in the accounting profession.

In North Carolina, as across the United States, the principle of auditor independence is mandated by professional standards and applicable law. The rules governing North Carolina CPAs require that a CPA engaged to provide an audit must do so in compliance with applicable “generally accepted auditing standards.” 21 NCAC 08N.0403 (App. 2).³ Those standards are the Generally Accepted Auditing Standards (“GAAS”) adopted by the AICPA. *Id.* AICPA’s standards emphasize the critical nature of independence in audit engagements:

This standard requires that the auditor be independent; aside from being in public practice (as distinct from being in private practice), he must be without bias with respect to the client since otherwise he would lack that impartiality necessary for the dependability of his findings, however excellent his technical proficiency may be. However, independence does not imply the attitude of a prosecutor but rather a judicial impartiality that recognizes an obligation for fairness not only to management and owners of a business but also to creditors and those who may otherwise rely (in part, at least) upon the independent auditor's report, as in the case of prospective owners or creditors.

³ Chapter 8 of Title 21 of the North Carolina Administrative Code contains the rules governing CPAs, promulgated by the State Board of Certified Public Account Examiners. 21 NCAC 08N.0403 requires CPAs to follow generally accepted auditing standards, and 21 NCAC 08N.0402 mandates independence in an auditing engagement. By rule, the GAAS which accountants must adhere to are the standards adopted by the AICPA. *Id.*

AICPA Auditing Standard AU § 220.02 (App. 8) (emphasis added) (standard effective through 2012).⁴

AICPA standards make clear that an auditor may *not* have any bias or duty in favor of the audit client:

It is of utmost importance to the profession that the general public maintain confidence in the independence of independent auditors. Public confidence would be impaired by evidence that independence was actually lacking, and it might also be impaired by the existence of circumstances which reasonable people might believe likely to influence independence. To be independent, the auditor must be intellectually honest; to be recognized as independent, he must be free from any obligation to or interest in the client, its management, or its owners.

AICPA Auditing Standard AU § 220.03 (App. 8) (emphasis added).

In addition to North Carolina's adoption of the AICPA's generally accepted auditing standards, the North Carolina rules governing CPAs also specifically require that an issuer of an audit report be independent. 21 NCAC 08N.0402 ("Independence") (App. 1). Under 21 NCAC 08N.0402, no audit report may be issued if independence is impaired. Examples in the rule of when independence would be impaired include when the auditor provides any service to a client that would create a special duty, such as serving as a director, officer, or trustee. *Id.*

⁴ Over time, AICPA standards have been subject to recodification. The standards cited in this brief are generally those applicable during the 2001-09 time period at issue in the Complaint. Citations to "AU-C" sections are standards which came into effect in December 2012. The fundamental nature of the independence requirement for auditors has not changed.

The requirement of independence of auditors is also an ethical obligation. The AICPA Code of Professional Conduct (AICPA Code) recognizes that any relationship where an accountant would be “promoting an attest client’s interests or position” is a threat to independence. AICPA ET § 100-1.14.⁵ Thus, for example, in the context of benefit plan administration services, the AICPA Code advises that an accountant who “serve[s] as a fiduciary as defined by ERISA” cannot comply with the independence requirement required to perform an audit. AICPA ET §101.05.⁶ It is therefore clear that a CPA cannot maintain the independence required to conduct an audit if the CPA is also serving in a fiduciary role.

B. Independence is also a fundamental requirement under federal law and international standards.

The requirement of independent audits also applies under federal law and international standards. U.S. Securities and Exchange Commission (“SEC”) rules require auditors to be independent of their SEC audit clients, both in appearance and in fact. These rules also make it unlawful for an auditor not to act independently, 17 C.F.R. § 240.10A-2 (App. 36); 210.2-02(b), and effectively forbid an auditor from serving “in a position of being an advocate for the audit client.” 17 C.F.R. § 210-2.01 (preliminary note) (App. 23).

⁵ See App 10. ET Section 100 (“Independence”) applied during the time period at issue in the Complaint. The current codification of the ethical rule on independence is at AICPA Code 1.200.

⁶ See also AICPA Code 1.295.115 for same prohibition in current version of Code of Professional Conduct.

Moreover, the Public Company Accounting Oversight Board (“PCAOB”), a non-profit corporation, was established under the Sarbanes-Oxley Act of 2002, to improve investor confidence in audits of public company financial statements. 15 U.S.C. § 78j-1; P.L. 107-204, §§ 101, 201-09, 116 Stat. 745, 750, 771 (“Sarbanes-Oxley Act of 2002 – Title II – Auditor Independence”). Firms registered with the PCAOB must comply with SEC independence rules for audits, and are subject to PCAOB oversight and enforcement.

Lastly, the International Ethics Standards Board for Accountants (IESBA) is an independent standard-setting body that establishes internationally appropriate ethics standards. IESBA standards also include strict requirements of independence in audit engagements, and recognize that independence serves the public interest. IESBA Code § 290, *Independence-Audit and Review and Engagements* (App. 37).

C. The Court of Appeals erred by equating an audit relationship with a fiduciary relationship.

As shown above, the laws and standards governing audit engagements strictly require that the relationship between an auditor and the subject of the audit be independent.⁷ This duty of independence is simply incompatible with a

⁷ As Petitioner notes, the requirements of auditor independence also apply, unsurprisingly, to North Carolina credit unions. See 04 NCAC 06C.0305 (requiring “Independent Audits”); N.C. Gen. Stat. § 54-109.49. Thus, not only do North Carolina CPAs have a duty to perform independent audits, but North

fiduciary relationship. Thus, the Court of Appeals erred in analogizing that the auditor-client relationship is “much more like that between attorney and client, broker and principal.” (Slip Op. at 8-9).

Indeed, in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the United States Supreme Court recognized that an auditor serves a role wholly different than the duty of an attorney to a client:

[T]he private attorney’s role [is] as the client’s confidential advisor and advocate, a loyal representative whose duty it is to present the client’s case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation’s financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation’s creditors and stockholders, as well as to investing public.

Id. at 817-18.

The Court of Appeals noted that auditors are “specially trained to perform comprehensive audits,” but this does not make an auditor a fiduciary any more than it makes any competent professional in a given field a fiduciary. This should be especially so in the case of audits, where an auditor strives to act with “judicial

Carolina credit unions must ensure they are *obtaining* independent audits. The allegations of the credit union in this case that its auditor owed it a fiduciary duty would mean, if true, that it has violated North Carolina law. Our courts should never recognize a common law duty that conflicts with existing regulatory and statutory law.

impartiality” in his conduct, and with strict independence. AICPA Auditing Standard AU § 220.02 (App. 8). The Supreme Court of North Carolina is particularly well situated to decide the question of whether it is advisable for North Carolina law to recognize a common law fiduciary duty that would be fundamentally inconsistent with professional standards and applicable state and federal law.

II. RECOGNIZING THE IMPORTANCE OF INDEPENDENCE, COURTS HAVE HELD THAT THE AUDIT RELATIONSHIP IS NOT A FIDUCIARY RELATIONSHIP AS A MATTER OF LAW.

No North Carolina appellate decision has squarely addressed the issue of whether an auditor is in a fiduciary relationship with the subject of the independent audit.⁸ Other courts, however, have considered the issue and have uniformly rejected the notion that an audit engagement creates a fiduciary relationship. In short, a claim for breach of fiduciary duty cannot be grounded on an allegation that an auditor failed to conduct an audit in accordance with generally accepted auditing standards.

⁸ The North Carolina accounting cases cited by the Court of Appeals did not address audit engagements and therefore have no application to that relationship. In *Harrold v. Dowd*, 149 N.C. App. 777, 561 S.E.2d 914 (2002), a non-audit relationship with an accountant was held not to create a fiduciary duty. And in *Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807 (1997), the plaintiff’s attorneys and accountants made grave errors in the handling of client trust funds and tax filings. The accountant did not perform an audit, and clearly would have been barred by independence requirements from doing so.

In *Resolution Trust Corp. v. KPMG Peat Marwick*, 844 F. Supp. 431 (N.D. Ill. 1994), suit was brought against an accounting firm for damages allegedly caused by improperly conducted audits of a bank's financial statements. Conducting a review of precedent, the court held that the nature of an audit engagement is fundamentally inconsistent with the role of a fiduciary:

An examination of those cases reveals that many courts squarely reaching the question have held that an independent auditor generally is not in a fiduciary relationship with its client. Some courts have gone as far as to observe that the nature of the independent auditor precludes a finding of fiduciary duty. The duty of a traditional fiduciary is to act 'in a representative capacity for another in dealing with the property of the other,' whereas an auditor acts 'independently, objectively and impartially, and with the skills which it represented to its clients that it possessed.' ”

Resolution Trust Corp., 844 F. Supp. at 436 (quoting *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1971)).

In fact, it appears that every case to have directly considered the issue of whether an audit engagement can create a fiduciary relationship has rejected the proposition. See, e.g., *Wright v. Sutton*, 2011 WL 1232607, at * 5 (S.D. W. Va. 2011) (App. 40) (granting motion to dismiss fiduciary duty claim under “general rule that an independent accountant does not have a fiduciary relationship with its client.”); *Strategic Capital Resources v. Citrin Cooperman & Company, LLP*, 213 Fed. App'x 842, 843 (11th Cir. 2007) (unpublished) (App. 47); *FDIC v. Schoenberger*, 781 F. Supp. 1155, 1157 (E.D. La. 1992) (“Other federal circuits

have held that accountants do not owe a fiduciary duty to their clients when providing services as auditor; rather the nature of an independent auditor is that it will perform the services objectively and impartially.”).

Some courts have acknowledged the possibility that exceptional circumstances could arise in some cases, such as if an accountant were to provide services *beyond* an audit. *See Resolution Trust Corp.*, 844 F. Supp. at 436. However, where the subject of an audit has alleged a fiduciary duty exclusively by virtue of the audit engagement, as the plaintiff has here, fiduciary duty claims have been routinely rejected. *Amici* submit that the overwhelming weight of authority does not recognize the fiduciary duty claim made by the plaintiff in this action, and this Court should not make North Carolina an exception to such a well-reasoned rule.

III. THE DECISION OF THE COURT OF APPEALS COULD NEGATIVELY IMPAIR THE AVAILABILITY OF INDEPENDENT AUDITS IN NORTH CAROLINA.

If the decision of the Court of Appeals is not overturned, it will cause confusion amongst North Carolina CPAs regarding whether and how they may continue to perform independent audits in conformance with professional standards. Absent clarity from the Court on the issue, the resulting uncertainty can be expected to lead to fewer CPAs willing to perform independent audits in North Carolina and have a negative impact on North Carolina businesses, creditors, and

economy as a whole due to both the reduced availability of and increased costs associated with independent audits. Under state law, and the generally accepted auditing standards of the AICPA (which have the force of law),⁹ North Carolina CPAs cannot issue valid audit reports unless they are independent from their clients. But if auditors are viewed as owing a fiduciary duty to their audit clients, then it is difficult, if not impossible, to reconcile how North Carolina CPAs can issue valid audit reports under existing North Carolina regulatory and statutory law while simultaneously owing a fiduciary duty to the audit client. The confusion over auditor independence will extend to not only CPAs, but also to audit clients and users of audit reports.

The Court of Appeals' decision is unclear as to whether the panel believed a standard audit engagement creates a fiduciary relationship as a matter of law in every case. The Court of Appeals suggested, without apparent consideration of professional accounting standards, that an auditor-client relationship looked "much more like that" of an attorney-client or broker-principal relationship. In doing so, the decision left open the possibility that a standard audit engagement could create a fiduciary relationship. However, this is wholly inconsistent with the concept of independence required by professional standards, and adopted by state and federal law. If the decision were to stand, the law of North Carolina would be at odds with

⁹ See Section I.A., *supra*.

every other jurisdiction that has directly addressed this issue. When a complaint contains allegations that an auditor failed to conduct an audit in accordance with generally accepted auditing standards, as was alleged here, a claim for breach of fiduciary duty should not be permitted.

Without a reversal, the rules and generally accepted auditing standards governing the conduct of audits in North Carolina would appear to be in irreconcilable conflict with judicial precedent. Even if CPAs were to continue performing audits in North Carolina following the confusion created by the Court of Appeals decision, it seems likely that the risk of litigation whenever a “bad result” occurs would increase, with any failing of an audit client now blamed on the auditor, ultimately raising the cost of performing an audit.

Not only would North Carolina CPAs be forced to contend with the potential impairment to their independence from their audit client, , but North Carolina companies could face challenges in finding North Carolina CPAs able to perform an independent audit. Indeed, any North Carolina company required to obtain an independent audit would be affected, including the credit union here , which is itself required by North Carolina law to have an independent audit of its financial statements. 04 NCAC 06C.0305.

For these reasons, *Amici* strongly urge this Court to grant discretionary review and reverse the decision of the Court of Appeals.

IV. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED ON ALL ISSUES.

The Court of Appeals' misapprehension of the nature of the auditor-client relationship also plainly influenced the court's reasoning when considering the auditor's affirmative defenses of *in pari delicto* and contributory negligence. Although plaintiff-respondent concedes that it alone was required under federal law to file tax returns, the Court of Appeals' opinion detours into discussions such as whether the failure of its general manager to file the returns should be "imputed" to the credit union. Likewise, in discussing the contributory negligence defense, the court suggests the failure to file tax returns could be "excusable conduct." It seems apparent that the court's discussion of the potential liability of the auditor, and the applicability of these defenses, was colored by the court's initial conclusion that an auditor can be a fiduciary of the subject of an audit.

Therefore, *Amici* recommend that the Supreme Court review the entire decision of the Court of Appeals in light of the court's error on the fiduciary duty issue. In considering whether plaintiff should be permitted to proceed with this action, this Court can take into proper consideration the fundamental importance of auditor independence under applicable law and public policy.

CONCLUSION

Amici respectfully submit that the decision of the Court of Appeals is in significant error. *Amici* urge this Court to grant discretionary review and reverse

the Court of Appeals, uphold longstanding principles of auditor independence, and hold that an auditor-client relationship cannot be a fiduciary relationship.

This the 13th day of January, 2015.

SMITH, ANDERSON, BLOUNT, DORSETT,
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I hereby certify that the foregoing BRIEF OF AMICI CURIAE NORTH CAROLINA ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS (NCACPA) AND AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (AICPA) IN SUPPORT OF PETITIONER was served upon the parties to this action by mailing a copy thereof by first class mail to the following counsel:

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APPENDIX

21 NCAC 08N.0402	App. 1
21 NCAC 08N.0403	App.2
AICPA Auditing Standard AU-C § 200 (excerpts).....	App.3
AICPA Auditing Standard AU § 220	App.8
AICPA ET § 100 (excerpts)	App.10
17 C.F.R. § 210-2.01	App.23
17 C.F.R. § 240.10A-2	App.36
IESBA Code § 290 (excerpt).....	App.37
<i>Wright v. Sutton</i> , 2011 WL 1232607 (S.D. W. Va. 2011)	App.40
<i>Strategic Capital Resources v. Citrin Cooperman & Company, LLP</i> , 213 Fed. App'x 842 (11th Cir. 2007)	App.47